

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 6

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE OF THE UNITED STATES, PETITIONER

vs.

DELBERT O. STARK, A. F. STRATTON, A. R. DENTON,
G. STEBBINS, AND F. WALSH

No. 7

DAIRYMEN'S LEAGUE COOPERATIVE ASSOCIATION,
INC., PETITIONER

vs.

DELBERT O. STARK, A. F. STRATTON, A. R. DENTON,
G. STEBBINS, AND F. WALSH

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONS FOR CERTIORARI FILED FEBRUARY 6, 1951
CERTIORARI GRANTED APRIL 16, 1951

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 10,365, 10,366

CHARLES F. BRANNAN, Secretary of Agriculture, APPELLANT

v.
DELBERT O. STARK, A. F. STRATTON, A. R. DENTON,
G. STEBBINS, F. WALSH, APPELLEES

DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC.,
APPELLANT

v.
DELBERT O. STARK, A. F. STRATTON, A. R. DENTON,
G. STEBBINS, F. WALSH, APPELLEES

APPEAL FROM A JUDGMENT OF THE UNITED STATES DIS-
TRICT COURT FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

1 Filed Sep. 22, 1941. Charles E. Stewart, Clerk
DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA

Civil Action, File Number 12944

DELBERT O. STARK, Randolph, Vermont; A. F. STRATTON,
Corinna, Maine, A. R. DENTON, Stowe, Vermont; G. STEB-
BINS, Enosburg, Vermont; F. WALSH, Greenwich, N. Y.

v.
CLAUDE R. WICKARD, Secretary of Agriculture of the United
States

COMPLAINT

1. The plaintiffs herein are citizens of the States of New
York, Maine, New Hampshire and Vermont, residing in the

respective places stated after their names at the end hereof. The plaintiffs bring this bill for themselves and for the benefit of all other persons similarly situated.

2. The defendant is Claude R. Wickard, the Secretary of Agriculture of the United States, whose official residence is in Washington, D. C.

3. Each of the plaintiffs produces milk and sells the same to "handlers", who resell and distribute such milk in the Greater Boston, Massachusetts, marketing area as defined by Order No. 4, as amended, issued by the defendant, the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, U. S. C. Title 7, § 601 et seq., which amends and reenacts certain provisions of the Agricultural Adjustment Act of 1933, 48 Stat. 31, as amended 49 Stat. 750, as hereinafter more fully appears, and each of the plaintiffs is a "producer" as defined in said Order No. 4 as amended.

4. Said Order No. 4 was amended by the defendant on July 29, 1941, effective August 1, 1941, and is presently effective as so amended: 6 Federal Register 3762. Said Order No. 4 regulates the handling of milk sold in the Greater, Boston, Massachusetts, marketing area; and to that end fixes minimum prices which shall be paid by all handlers for such milk, the value thereof being determined in accordance with the use of such milk by the handlers to whom it is sold; and provides for the equalization of such payments by handlers so that, subject only to certain adjustments set forth in said Order, all producers shall receive a uniform blended price per hundredweight for such milk, irrespective of the use to which it may be put by the handlers to whom it is sold. A true copy of said Order No. 4 is attached hereto, marked "Exhibit A".

5. Section 904.9 of said Order No. 4 requires the Market Administrator (who is the agent appointed and removable by the defendant) to make certain payments on the 25th day of each calendar month to cooperative associations of producers which the defendant Secretary of Agriculture has determined to be qualified therefor in accordance with

the terms of said Section. Said payments, consisting of 1½ cents per hundredweight of milk marketed by any such cooperative association on behalf of its members and of 5 cents per hundredweight of Class I milk received from producers at a plant operated under the exclusive control of member producers and sold to proprietary handlers,

purport to be payable in the manner and subject to the limitations more specifically set forth in Exhibit

A hereto, to which reference is hereby made. None of the plaintiffs is a member of a cooperative association which is or may be eligible for such payments, and because of the foregoing provisions of Section 904.9, many of the plaintiffs voted against the adoption of said amendment to Order No. 4 promulgated on July 29, 1941, at the time said amendment was submitted to a producers' referendum pursuant to Section 8c(9) of the Agricultural Marketing Agreement Act of 1937 (U. S. C. Title 7, § 608c (9)).

6. Said Order No. 4 requires such payments to cooperative associations from funds paid pursuant to Section 904.8 (b)(3) of said Order No. 4, by handlers the value of whose milk during the preceding month, as determined in accordance with the minimum prices fixed by Section 904.4, exceeds their payments to producers therefor, as determined in accordance with the uniform blended price computed and announced pursuant to Section 904.7.

7. The plaintiffs, together with all other producers whose milk is marketed pursuant to said Order No. 4, are paid the blended price as computed and announced by the Market Administrator pursuant to Section 904.7. Said blended price is computed by dividing the value of all milk purchased by handlers during the preceding month, as determined on the basis of the minimum prices fixed by Section 904.4 according to the uses made of such milk, by the total volume of milk so included. Notwithstanding lack of authority therefor, as hereinafter more fully appears, subparagraph (b)(5) of said Section 904.7 further provides that there shall be deducted from the value of such milk the amount of the payments required to be made to cooperative associations pursuant to Section 904.9—all as more specifically set

forth in Exhibit A hereto, to which reference is hereby made. As a result of said unauthorized and illegal deduction the blended price announced by the Market Administrator is less than the average value of the milk marketed pursuant to said Order No. 4 by the plaintiffs and other producers serving the Greater Boston marketing area.

8. On information and belief, the Market Administrator has sent to each cooperative association operating in the Greater Boston marketing area a form of application to the defendant for qualification as a cooperative association to receive the payments specified in said Section 904.9, accompanied by a questionnaire to be returned therewith setting forth information relative to the requirements of said Section. On information and belief, the foregoing action of the Market Administrator was taken on behalf of the defendant Secretary of Agriculture, and numerous applications, together with accompanying questionnaires, have been submitted to the defendant by cooperative associations seeking to be determined as eligible for the payments specified in said Section 904.9.

9. On September 12, 1941, the Market Administrator announced the blended price applicable to milk delivered to handlers during August, 1941, by the plaintiffs and other producers serving the Greater Boston marketing area, and made public the computations thereof and certain further information as required by Section 904.7 of said Order No. 4. A true copy of said announcement, marked "Exhibit B," is attached hereto. Said announcement discloses that the sum of \$15,575.31 was deducted pursuant to Section 904.7 (b) (5) for payments to cooperative associations to be certified by the defendant Secretary of Agriculture as above with respect to deliveries made during August, 1941.

10. The plaintiffs are informed and believe that the defendant Secretary of Agriculture is about to determine, or has already determined, pursuant to Section 904.9 that certain co-operatives are qualified and entitled to receive the payments specified by said Section 904.9; whereupon

such payments will be made on or before September 25, 1941, with respect to milk delivered in the month of August, 1941.

5 11. Upon the qualification of any cooperative association by the defendant Secretary of Agriculture on or before September 25, 1941, immediate payment is to be made to such cooperative from the funds set aside for that purpose in the computation of the blended price for August, 1941, from the total milk payments by handlers for milk delivered to them, which funds will be received by the Market Administrator on September 23, 1941, pursuant to Section 904.8(b)(3) of said Order No. 4. Further, upon the qualification of any cooperative, similar payments will be made in all succeeding months and similar deductions will be made in computing the blended price payable to the plaintiffs in all succeeding months.

12. As shown by the Market Administrator's announcement attached hereto as Exhibit B, the deduction of \$15,575.31 made by the Market Administrator pursuant to Section 904.7(b)(5) in computing the blended price for August, 1941, resulted in decreasing the price to be received by the plaintiffs for milk delivered in said month by 1.55 cents per hundredweight. Larger deductions in succeeding months, upon the issuance of further qualifications by the defendant, will result in further decreases in the blended price to be received by the plaintiffs. The monthly deliveries made by each plaintiff range from 7,000 pounds to 26,000 pounds; and the reduction in the blended price by $1\frac{1}{2}$ cents or more to provide for the cooperative payments specified in Section 904.9 will result in annual losses to the individual plaintiffs ranging from \$10.50 to more than \$39.00 per year.

13. Said Order No. 4 as amended is promulgated under the authority of Sections 8c(5) and (7) of the Agricultural Marketing Agreement Act of 1937. Section 8c(5) specifies the terms which may be included in an order affecting milk and its products and reads in part as follows:

or more of the following terms and conditions, and (except as provided in subsection (7)) no others:"

None of the provisions of Section 8c(5) thereafter enumerated, or of subsection (7) therein referred to, authorizes Sections 904.9(a)-(d) and 904.7(b)(5) of said Order No.

4. Said provisions were issued as part of said Order No. 4 by the defendant Secretary of Agriculture without legal authority, and are unlawful and void; and said defendant is without legal authority to make any qualifications of or to certify, any cooperative association as eligible for the payments specified in said Sections.

14. Unless the relief sought herein is granted, the plaintiffs are informed and believe that the defendant Secretary of Agriculture will forthwith issue qualifications to certain cooperatives whose applications therefor are now pending before him. Thereupon payments will be made to such cooperatives for deliveries of milk made in August, 1941, and said fund of \$15,575.31 will be dispersed and irretrievably lost to the plaintiffs and other producers serving the Greater Boston marketing area, to whom it rightfully belongs and to whom it should instead be paid in accordance with the provisions of said Agricultural Marketing Agreement Act of 1937; and further, in succeeding months similar funds will likewise be distributed in unlawful payments to cooperative associations and will likewise be dispersed and irretrievably lost to the plaintiffs and other producers, all of whom are entitled to be paid the blended price computed without deduction for such unlawful payments.

15. The aforesaid illegal deductions would deprive the plaintiffs and over six thousand other dairy farmers similarly situated of more than \$60,000.00 per year at a time when the plaintiffs and such other farmers require full payment for their milk in order to meet the rising costs of milk production.

16. The plaintiffs are not afforded a method of administrative relief in the aforesaid Agricultural Marketing Agreement Act of 1937 as amended, or otherwise; and said plaintiffs are without adequate remedy at law.

WHEREFORE, the plaintiffs pray:

(1) That a temporary restraining order be issued, enjoining the defendant from qualifying or certifying the qualification of any cooperative association of producers under Section 904.9 of said Order No. 4 as amended, and requiring the defendant to suspend any such qualifications or certifications theretofore made.

(2) That a preliminary injunction be issued during the pendency of this action, enjoining the defendant from qualifying or certifying the qualification of any cooperative association of producers under Section 904.9 of said Order No. 4 as amended, and requiring the defendant to suspend any such qualifications or certifications theretofore made.

(3) That a permanent injunction be issued, enjoining the defendant from qualifying or certifying the qualification of any cooperative association of producers under Section 904.9 of said Order No. 4 as amended, and requiring the defendant to withdraw or cancel any such qualifications or certifications theretofore made.

(4) That the Court declare the provisions of Section 904.9(a)-(d) and Section 904.7(b)(5) of said Order No. 4 to be unauthorized, illegal and void.

(5) That the plaintiffs have such other and further relief as is just.

Respectfully submitted,

DELBERT O. STARK,
Randolph, Vermont.

A. F. STRATTON,
Corinna, Maine.

A. R. DENTON,
Stowe, Vermont.

By their attorney,

HARRY POLIKOFF,
525 Lexington Ave.,
New York, N. Y.

GEORGE STEBBINS,
Enesburg, Vermont.

FRANCIS WALSH,
Greenwich, New York.

Local attorney

WALTER J. BROBYN,
 716 Investment Bldg,
Washington, D. C.

8 [Stamp:] Filed Sep. 22, 1941. Charles E. Stewart,
 Clerk

STATE OF VERMONT,
 Orange County, ss.

September 20, 1941.

Then personally appeared before me Delbert O. Stark one of the Plaintiffs named in the foregoing complaint, to me known, and deposed and said:

That he had read the foregoing complaint,

And that the allegations contained therein are true to his own knowledge, except such allegations as are made on information and belief, and as to such allegations he believes them to be true;

And that unless a temporary restraining order is issued, the Plaintiffs will suffer immediate and irreparable injury as alleged in such complaint.

DELBERT O. STARK,
Plaintiff and Affiant.

Subscribed and sworn to before me. Philip A. Angell,
 Notary Public. (Seal.) My commission expires
 Feb. 10, 1943.

Sept. 24, 1941.

Plaintiff's oral motion for temporary restraining order after informal hearing at which counsel for defendant were present is denied without prejudice to a motion for preliminary injunction.

JESSE C. ADKINS,
Justice.

EXHIBIT B [to original complaint]

Market Administrator
for the

Greater Boston Marketing Area

Uniform Prices for 3.7 Milk, By Zones

August 1-31, 1941

Blended Price
per cwt. to
Regular Producers*Class II Price
per cwt. to
New Producers

For milk delivered to plants located within
40 miles of the State House in Boston.
For milk delivered to plants located more
than 40 miles from the State House in
Boston, as follows:

Zone	Miles	Blended Price per cwt. to Regular Producers*	Class II Price per cwt. to New Producers
6	51-60	2.595	2.058
10	91-100	2.569	2.058
11	101-110	2.565	2.058
12	111-120	2.560	2.058
13	121-130	2.552	2.058
14	131-140	2.542	2.058
15	141-150	2.527	2.058
16	151-160	2.513	2.058
17	161-170	2.513	2.058
18	171-180	2.490	2.058
19	181-190	2.481	2.058
20	191-200	2.476	2.058
21	201-210	2.470	2.058
22	211-220	2.442	2.058
23	221-230	2.436	2.058
24	231-240	2.432	2.058
25	241-250	2.432	2.058
26	251-260	2.421	2.058
27	261-270	2.415	2.058
28	271-280	2.410	2.058
29	281-290	2.410	2.058
30	291-300	2.400	2.058

*Location Differentials—To the above prices To Regular Producers Only are to be added the following amounts:

For milk from farms located within 40 miles of the State House, in Boston or located in Barnstable or Plymouth Counties, Massachusetts 46¢ per cwt.

For milk from farms located within 40-80 miles of the State House in Boston 23¢ per cwt.

Butterfat Differential—To all producers, for each 1/10 of 1% variation from 3.7% test \$.052

Deductions—From all the above prices, deductions are to be made as follows:
From members of qualified associations (Sec. 904.9(e)). (Such deductions as are authorized by mem-
(bers.)

320 MARKET ADMINISTRATOR—GREATER BOSTON MARKETING AREA

HANDLERS WHOSE MILK WAS INCLUDED IN THE BLENDED PRICE COMPUTATION

For the Period August 1-31, 1941

Ashland Farms Milk Co.

Bellows Falls Co-op. Creamery, Inc.

J. C. Black & Son.

A. Louis Bodge.

W. T. Boyd & Sons, Inc.

James A. Binstead Co., Inc.

David Buttrick Co.

Cabot Farmers' Co-op. Creamery Co., Inc.

Guy B. Chaloner.

George L. Chapin.

Cloverluck Dairy, Inc.

C. W. Coburn.

S. Colombosian.

Michael W. and Daniel L. Comiskey d/b/a Valley Farm.

Albert H. Crompton.

B. L. Cummings, Inc.

J. M. Curran, d/b/a Our Haven Farm Dairy.

Louis W. Dean, d/b/a Dean Dairy.

Deerfoot Farms Company.

James deNormandie and Floyd Verrill, d/b/a The Dairy.

Logan R. Dickie, Jr., d/b/a Chestnut Hill Farm.

Dunajski Bros.

Elliott Creameries, Inc.

Elm Spring Farm Co-operative.

Fairview Creamery, Inc.

Margaret A. Forbes, d/b/a Forbes Milk Company.

Mason Garfield, d/b/a River Road Farm

Rocco L. Grasso, d/b/a Needham Dairy.

Benjamin R. Greenblott, d/b/a Hillcrest Farm Dairy.

Melville G. Grey, d/b/a Greycroft Farm.

Joseph L. Griffin.

John B. Henshaw & Son, Inc.

Hillside Dairy Co., Inc.

Harold W. Holden Corp.

H. P. Hood & Sons, Inc.

Frank T. Hutchinson, d/b/a Dell Dale Farm.
 Kiley Farm.
 Mrs. L. L. Kinsman, d/b/a Kinsman's Dairy.
 George J. Knapp, Inc.
 John Kordalski.
 August Korkatti, d/b/a Woodland Farm Dairy.
 Harry Lanzillo, d/b/a Happy Valley Dairy.
 F. W. Laroe and John E. Burr, d/b/a Laroe & Burr.
 Walter Lovelace, d/b/a Lovelace Bros.
 Lyndonville Creamery Assn.
 Leo W. Madigan, d/b/a Maplehurst Farms.
 Manchester Dairy System, Inc.
 Maple Hill Farm Dairy, Inc.
 Mrs. Lucinda A. Martin.
 Martines Bros.
 Mason's Creamery Co.
 J. F. McAdams & Bros., Inc.
 McCarthy Bros. Milk Co., Inc.
 A. J. McNeil & Sons, Inc.
 Meadow Brook Farm, Inc.
 Milton Co-op. Dairy Corp.
 New England Dairies, Inc.
 Norway Creamery, Inc.
 * A. R. Parker Company.
 Pezold Creamery, Inc.
 George W. Pierce, d/b/a Groveland Dairy.
 J. B. Prescott Co., Bedford Farms Dairy.
 Putnam Bros.
 M. J. Quinn.
 Anthony W. Recka.
 A. J. Robinson, d/b/a Mountain View Creamery.
 St. Albans Co-op. Creamery, Inc.
 John A. Sellars Dairy, Inc.
 Seven Oaks Company, Inc.
 Patrick J. Shanahan, d/b/a Lawrence Farms Milk Co.
 Shawsheen Dairies, Inc.
 John and Joseph Silva, d/b/a Paramount Dairy.
 Jacob Soroko, d/b/a Soroko's Farm Dairy.

So: Stratford Creamery, Inc.

Clinton W. Spear.

H. L. Stone Dairy, Inc.

United Farmers' Co-op. Creamery Assn., Inc.

Valley View Creamery, Roland Seward.

Vermont Dairy Co., Inc.

Weiler-Sterling Farms Co.

Wells River Creamery, Inc.

White Bros.

White Bros. Milk Co., Inc.

White Creamery Co., Inc.

Whiting Milk Company.

Granville A. Wiswall.

Martin Witte, Trustee for Shawsheen Dairy, Inc.

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Market Administrator—Greater Boston, Massachusetts, Marketing Area Extracts from the Computations Which Resulted in the Uniform Prices Announced for the August 1-31, 1941 Period (Sec. 904.7 (b) (9))

Sec. 904.7(b)

(1) Total of the respective values of milk		\$2,577,812.71
(2) Total amount of payments required from handlers pursuant to Sec. 904.8(a) and (b)		3,099.90
(3) Total net amount of the differentials applicable pursuant to Sec. 904.8(e)		232,941.90
		<u>\$2,813,854.51</u>
(4) Total amount to be paid to producers pursuant to Sec. 904.8(b) (2) (New Producers)	\$6,299.95	
(5) Total of payments required to be made for the delivery period pursuant to Sec. 904.9(b)	15,575.31	21,875.26
		<u>\$2,791,979.25</u>
(6) Total milk received from regular producers	100,571,285 lbs.	
Blended price per cwt.		\$2.776
(7) Deduction for the purpose of retaining a cash balance .....		.045
		<u>\$2.731</u>
(8) Addition for the purpose of prorating cash balance available .....		.050
		<u>\$2.781</u>
Basic blended price from which zone prices are calculated ..		

	Pounds of Milk	
	Total	Daily Average
Total Receipts reported	100,875,197	3,254,039
Net Class I Milk reported	54,158,191	1,747,038
% Class I Milk to Total Receipts	53.69%	

Office of the Market Administrator
Room 746, 80 Federal Street, Boston, Mass.
September 12, 1941.

9 Filed Nov. 25, 1941. Charles E. Stewart, Clerk

MOTION OF DEFENDANT FOR SUMMARY JUDGMENT

Comes now the defendant, Claude R. Wickard, Secretary of Agriculture of the United States, and, pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure, moves the Court for a summary judgment in his favor, dismissing the complaint exhibited against him herein at the cost of the plaintiffs. The grounds upon which this motion is based are as follows:

1. The plaintiffs have no standing to maintain this action because from the face of the complaint it appears that the plaintiffs are all "producers" of milk and no one of the plaintiffs is a "handler" of milk within the meaning of the Agricultural Marketing Agreement Act of 1937.

2. The complaint fails to show that the plaintiffs are injured in any way by the regulation complained of.

3. The complaint does not show facts sufficient to establish the action as a class action.

4. The amendment of Order No. 4 attacked in the complaint is clearly authorized by the Agricultural Marketing Agreement Act of 1937.

5. The defendant's findings set forth in Section 10 904.0 of the order as amended were made upon the evidence introduced at a public hearing and are supported by substantial evidence taken at said hearing and should be given effect by the Court.

6. The provisions of Order No. 4 as amended which are complained of in the complaint were issued in accordance with law and are in all respects valid.

7. The pleadings, admissions and affidavits on file (including the affidavit of H. L. Forest attached hereto and filed in support of this motion) show that there is no genuine

issue as to any material fact and that the defendant is entitled as a matter of law to a judgment dismissing the action.

EDWARD M. CURRAN,
United States Attorney.

BERNARD J. LONG,
Assistant United States Attorney.

JOHN S. L. YOST,

CHARLES C. PEARCE,

Special Assistants to the Attorney General.

11 Filed Nov. 25, 1941. Charles E. Stewart, Clerk

AFFIDAVIT OF H. L. FOREST

H. L. Forest, first being duly sworn, deposes and says:

I am the Head of the Milk Section of the Dairy Division, Surplus Marketing Administration of the United States Department of Agriculture, and have been Principal Agricultural Economist of said Dairy Division since June 1, 1941. I have been on the staff of the Dairy Division as an economist since 1935, coming to this Division from the Federal Milk Market Administrator's office in Boston, Massachusetts. Prior to that, I studied economics and milk marketing at Harvard University, completing my studies there in 1933.

In my official capacity, it has been my duty to observe closely the development and operation of regulatory programs for milk under the Agricultural Marketing Agreement Act of 1937 and precursory legislation. I actively participated in formulating and have been constantly

12 familiar with the details of the promulgation and administration of Order No. 4, regulating the handling of milk in the Greater Boston, Massachusetts, marketing area, and the various amendments to this order, including the amendments issued July 29, 1941, effective August 1, 1941.

I have read the complaint in the above entitled case, and the matters and facts hereinafter stated with respect to the allegations contained in the said complaint are based on my

personal knowledge, and the opinions herein expressed are based on my considered judgment exercised in the light of my knowledge, training and experience in dealing with milk marketing problems.

With respect to the payments to cooperative associations of producers which, as alleged in the complaint, are required to be made under the Order as amended July 29, 1941, to cooperative associations which the Secretary has determined to be qualified to receive such payments, applications have been received by the Secretary from several cooperatives and are now under consideration, but, as of November 18, 1941, no final decision with respect to any such application has been rendered by the Secretary. In anticipation of the qualification of one or more such cooperatives to receive such payments for services rendered to the market from the effective date of the amendments, to wit, August 1, 1941, the Market Administrator has set aside a reserve fund of \$15,575.31, based on the maximum amount of payments that would be made for the month of August, 1941, if all applying cooperatives should be established as qualified to receive payments. As of November 18, 1941, no payments have been made, but payments will be made to such cooperative associations as are determined by the Secretary to have qualified.

13 Although the computations by which the plaintiffs reach the figure of 1.55 cents per hundredweight mentioned in paragraph 12 of the complaint are mathematically correct, it does not follow as a proper conclusion that the uniform price established under the order as the minimum price payable to the plaintiffs for their milk would have been 1.55 cents higher in the absence of the amendments complained of. The amount of the return to the producer in the form of the blended price for any particular month depends on a number of factors in the marketing of milk which necessarily have unknown values in this hypothesis. Furthermore, the blended price payable to all producers supplying the market is at all times merely a minimum price, and the producer is free to demand and to receive any amount over and above the announced blended

price. In a number of markets where Federal milk orders are in effect, including the Boston market, many producers are selling their milk at substantial premiums above the announced blended price. In some instances the premium is as much as 45 cents per hundredweight.

Aggregate deductions from the producer settlement fund in excess of \$15,575.31 per month to make payments to cooperative associations under the amendments complained of in months subsequent to August, 1941, are not likely to be required, as the amount reserved for August payments is based on the possible approval of applications of all cooperatives that may be expected to become qualified. Thus, the amount reserved for August payments is as large as, and probably larger than, the amount necessary to cover payments in succeeding months. The conclusion reached by the plaintiffs that, on the basis of the volume of milk which they regularly deliver, the payments to cooperative associations authorized by the amendments will result in annual losses to the individual plaintiffs ranging from \$19.50 to approximately \$39.00 per year is not supported by adequate premises, because, as heretofore pointed out, the alleged rate of reduction of 1.55 cents per hundred-
 14 weight is the result of a computation based on the plan of marketing which incorporates the amendments and the incentive to orderly marketing inspired and encouraged by the amendments. In the presence of marketing elements resulting from the amendments that would have been absent under a plan of marketing in which these payments to cooperative associations for the specified services were not included, it is impossible to determine either the blended price which otherwise would have been announced as the minimum payable to the plaintiffs or to determine the price over and above such blended price which the plaintiffs could probably have demanded and received.

Likewise, it cannot be said, as alleged in paragraph 14 of the complaint, that the amounts which may aggregate \$15,575.31 per month as a maximum, but will probably be less, paid to cooperative associations under the amendments will be "dispersed and irretrievably lost to the plaintiffs",

because these payments are for services to the market as a whole and form part of the plan for orderly marketing embodied in the order as amended, from which the plaintiffs will benefit to the same extent that all producers supplying the market benefit from the establishment and maintenance of orderly marketing conditions in the market.

The Boston milk marketing order is a complicated mechanism. It cannot be otherwise because of the complex nature of the marketing process which it is designed to regulate. It establishes on the basis of utilization minimum prices that handlers must pay for milk. In order that such prices may result in equitable distribution of this minimum value of the market's milk among producers, it provides machinery for equalizing among producers this
15 minimum value of the milk of all handlers, and it provides numerous differentials to adjust for the various economic variations within the market and the supply area, such as transportation rates, cost of operating receiving plants, and geographic location of producers.

Prior to the issuance of the amendments of July 29, 1941; a public hearing was held with respect to the proposal to incorporate in the order provisions of the character embodied in these amendments. This public hearing was conducted in two sessions. The first session was held on October 14, 1940, at Montpelier, Vermont; on October 16 at Augusta, Maine; and on October 17 and 18 at Boston, Massachusetts. The second session was held on May 14, 1941, at Montpelier, Vermont, and on May 15 to 22, inclusive, at Boston, Massachusetts. I attended all sessions of this hearing and heard the testimony and evidence introduced by interested parties who attended. I have also examined the transcript of the record of the hearing containing all testimony taken and exhibits and briefs submitted to the Secretary, upon which the Secretary made the findings contained in the amendments of July 29, 1941, and issued such amendments.

This evidence so taken and upon which the Secretary acted in issuing the aforesaid amendments of July 29, 1941, included a considerable amount of testimony, exhibits and

briefs, both in favor of, and in opposition to, the provisions relating to the cooperative payments. The record shows that the problems involved were thoroughly analyzed and fully discussed from all points of view. All interested parties were given full opportunity to be heard.

In substance, there was evidence before the Secretary showing, among other things, the following:¹

16 *A. Services of value to all producers rendered by cooperative associations.*

Successful operation of the order to achieve the benefits to producers which it is designed to provide is greatly aided by two types of activity of producers' cooperative marketing organizations.

The first type of activity is that of presenting evidence concerning the needs of producers with respect to prices for milk and allowances and differentials for handling that must be adduced at public hearings to enable the Secretary to evaluate, and from time to time to amend, the terms of the order to best represent the needs of producers. A related function is educational work among producers that must be carried on to enable them to understand the order.

The second type of activity consists of assuming responsibility for a reserve of milk that is constantly available to meet the irregular needs of distributors for fluid milk that is essential in the type of regulation in effect in Boston that provides market-wide equalization among all producers of total value of milk.

(1) Research, analysis and presentation of producer problems and needs.

The problems and needs of producers have been presented predominantly by representatives of cooperative associations at the public hearings held in connection with

¹ Hereinafter, matter appearing in footnotes will represent the comments of the affiant upon the evidence.

the milk marketing order.² Order No. 4 regulating the handling of milk in the Greater Boston marketing area was first made effective February 9, 1936, and, to and including the changes made effective August 1, 1941, it has
17 been amended four times. At the public hearings preceding promulgation of the order and preceding each of its subsequent amendments during a period of more than five years, more than 4,000 pages of testimony have been taken. Most of the provisions and proposed changes in the interests of producers have been advanced and supported by representatives of cooperative associations. From time to time there have been proposals advanced and testimony presented by representatives of cooperatives that pertained more to the interests of their own producers than to the interests of other producers; but such proposals and the supporting evidence had to undergo analysis and critical comment in the same hearing with proposals and evidence submitted by other cooperatives with conflicting interests.³

In the case of cooperatives known as bargaining associations, that engage in activities incidental to the marketing of their members' milk short of physical handling of the product, representation of producers at public hearings relative to promulgating or amending the milk marketing order has largely displaced their prior activity of bargaining or negotiating directly with distributors for a price and conditions of sale of members' milk. The hearings incident to Federal regulation have, to a certain extent, displaced such bargaining; a major amount of attention being now directed toward the price that distributors shall pay all producers and the allowances and differentials related thereto.

² The records of these public hearings demonstrate that individual producers do not have the time, training or resources to analyze and present producer problems and to initiate and support remedial proposals.

³ The information thus made available by such representation of the interests of various groups of producers has aided in obtaining a comprehensive picture of producers' needs and problems for the Secretary's analysis.

The activities of the bargaining associations on behalf of their members in proposing and supporting adequate
 18 class prices for milk are of benefit to non-members.

There are also other benefits which non-member producers secure from the existence in the market of strong cooperative associations to represent the interests of many producers. This is attested to by Mr. J. L. Carten, who represented a group of so-called "non-member" producers.

His testimony was to the effect that there are services rendered to the market by cooperatives that are comparable to the services for which citizens pay taxes. He felt that the existence of cooperative plants that would handle his milk in case he should lose his present market is good insurance against losing his market. Part of this testimony is as follows: "As a non-member, I realize that things are taking place daily in the milk market and in the Municipal, State and National Governments that affect my income just as much as though my cows did not get milked dry. Obviously, I cannot be in all those places and it is worth a considerable amount of money to me to feel that representatives of producers are watching my interests every day. The fact that there are cooperative plants . . . is good insurance that proprietary dealers will conduct their relationships with producers fairly. Operating cooperatives (are) a yardstick by which I can measure the efficiency of a proprietary dealer's services." Testimony of a representative of one of the principal handlers in Boston, who formerly represented a large milk producers bargaining association, comparable to those in the Boston market, testified that the efforts of bargaining associations to secure higher prices were of benefit to producers who were not members of the association, as well as being of benefit to the members.

Cooperatives which own and operate plants and
 19 thereby serve their members by physical handling of milk have their prices and certain conditions of sale determined by the order. They have found it necessary to represent their members at hearings to inform the Secretary adequately of their problems and needs. Much

of the evidence on actual cost of plant operation in the Boston milkshed was compiled and presented by cooperatives operating their own plants.

Cooperatives in the Boston market have gone beyond their own marketing area to represent producers' interests with respect to inter-relationships with other markets. In 1940, several associations were represented at hearings on amendments proposed for the New York milk marketing order. In this instance they submitted evidence that aided the Secretary in his development of amendments to the regulations for both the Boston and New York markets that prevent marketing agencies in one market from enjoying unfair competitive advantages in the other market.

Cooperatives devote much study and research to marketing problems and also carry on educational activities designed to give producers a better understanding of the order. Without constant study of the market's problems by competent research workers and educational work among producers, the successful operation of the order is hampered.

(2) Maintenance of reserve supplies of milk.

The second kind of activity for which cooperatives are entitled to payment is the providing of a reserve supply of milk for the market that is constantly available to meet the irregular needs of handlers for fluid milk. A large proportion of the milk handlers in Boston depend for their reserve milk supply on cooperative associations maintaining plants.

An analysis of the sales of Class I milk to proprietary handlers by all operating cooperatives in the Boston market in 1939 reveals that Class I milk was sold to 159 of a total of 476 handlers in the market. Of the 134 handlers in the market receiving milk from producers (such handlers handle most of the market's milk) 83 bought milk from plants of cooperatives. In other words, 60 per cent of the principal handlers of milk in Boston purchased milk for Class I use from cooperatives at some time during the year. In addition, cooperatives served 25 per cent of the handlers who otherwise produced all of their own milk.

and 20 per cent of the handlers who received all of their milk from other handlers.

These analyses show further that these selling operations are of an extremely irregular nature. Though 83 different handlers who received milk from producers also purchased milk from cooperatives, the number varied throughout the calendar year from a low of 20 in June to a high of 52 in November. The number of handlers who otherwise produced all of their own milk varied from a low of 10 in June to a high of 25 in January. For all handlers served by cooperatives, the variation was from a low of 55 in June to a high of 104 in November. The requests of handlers for milk from cooperatives are of such an irregular character that there were twice as many of the principal handlers requesting milk in July as in June (38 compared to 20). The extreme variation in demand upon cooperatives for Class I milk is further revealed by the fact that demands of all handlers increased 60 per cent from July to August, or from 7,500,000 to 12,000,000 pounds of milk.

21 An analysis of the length of time during the year that various handlers needed milk from cooperatives indicates that, of the total of 159 handlers served, 59, or 25 per cent, purchased milk for three months or less; 88, or more than one-half, purchased milk for six months or less.

Ability to meet this irregular demand for milk that fluctuates as much as 60 per cent from one month to the next requires the maintenance of facilities for, and the handling of, a large reserve supply of milk, and the maintenance of equipment for converting the milk to manufactured dairy products when it is not needed as fluid milk in the market.

Many cooperatively owned plants are thus equipped. Two of the largest proprietary handlers in the market also have sufficient handling facilities and equipment to handle a large reserve of milk. There are many points in the Boston supply area where duplicate facilities for receiving and handling milk exist. At many points there are plants

of proprietary handlers and of cooperatives near to each other, each with sufficient capacity to handle all of the milk in that locality.

Servicing the market, however, depends not only upon maintenance of a reserve supply of milk, but the use of that supply to meet the irregular demand for fluid milk. Cooperative associations not only have the facilities for handling the market's reserve of milk, but they actually make this reserve available for the irregular needs of handlers of Class I milk. Proprietary handlers, in spite of their ability to handle surplus milk, are not called upon to make such milk available as a reserve supply to other handlers who are their competitors. Mr. L. A. Cooley, representing the Whiting Milk Co., one of the two above-mentioned proprietary handlers, in answer to the
22 question, "Is there any class of handlers in the market that rely upon you to have milk for them because they are not carrying enough in their own channels and trade to take care of them in short periods?", replied as follows: "No, I would not say there are handlers who rely upon us."

Mr. Don Geyer, representing H. P. Hood & Sons, the other of these two proprietary handlers, in reply to the question, "Would you think another proprietary handler would customarily buy milk from the Hood Company?", said: "The only reason the proprietary (handler) does not like to buy from another is because he does not like to say to his customers 'I am buying milk from Hood'. He does (buy) from cooperatives with whom he is not in competition, with the market, and that is another difficulty of the proprietary handlers' selling to each other." Mr. Geyer further testified regarding cooperatives that "to some extent their milk is subject to call for Class I use"

This service which cooperatives perform benefits all producers in the market. This arises from the fact the service is needed to enable the successful operation of the market-wide equalization pool which is a device for distributing the total value of the milk in the market in a manner that

best serves the interests of all producers. Prior to the establishment of the equalization pool a single marketing agency needed to exert its efforts to secure as large a share as possible of the market's fluid milk (highest per unit use value) trade in order for the average prices to its producers to be as high as possible or at least compare favorably with the agency's competitors. Under the equalization pool of the marketing order this incentive no longer exists, as the variation in use value of milk among all handlers is automatically equalized among all producers. With this arrangement some marketing agency or agencies must assume responsibility for supplying the irregular needs of fluid handlers for milk or the supply available in the market may be inadequate.

B. *The plan of payment*

The payment plan should be in two parts in recognition of the two types of service. Payment at a rate not to exceed $1\frac{1}{2}$ cents per hundredweight on the volume of members' milk should be allowed for the first type of service: representation of producer interests at hearings, educational work, and other activities that advance the interests of all producers and generally contribute to successful operation of the marketing order and to the effectuation of the declared policy of the Act. Payment at the rate of 5 cents per hundredweight should be allowed on certain sales of Class I milk to proprietary handlers to enable cooperatives to assume the responsibility of supplying the irregular needs of such handlers for fluid milk.

Although both kinds of market services are being performed by some cooperatives, there is great variation among the cooperative associations in the market as to their ability and desire to perform the services. Among bargaining associations, there is, at one extreme, merely a group of producers who do no more than meet together and designate one or more of their number to represent the attitude of the group at hearings, and, at the other extreme, an association that contracts to market, to check weights and tests, and to guarantee payment for its members' milk,

and, in addition, maintains a staff of workers for management, research, investigation, and education that is adequate to cope with the complex nature of the problems incident to the marketing of milk. Some of the groups of producers that are the least active are not organized under the laws of any State, have no formal constitution or bylaws and apparently their program does not entail sufficient expense to need dues from members. The association with the most extensive program of activities requires dues of 3 cents per hundredweight of members' milk to defray expenses. In between these two extremes there is one association that operates on dues of $\frac{1}{2}$ cent per hundredweight, another that operates on dues of 2 cents per hundredweight, and another that operates on dues of $2\frac{1}{2}$ cents per hundredweight of members' milk, and the variation in magnitude of their activities is, to a large degree, directly proportional to the amount of dues deducted.

Among cooperatives which operate plants there is a considerable range in types of marketing activities, some of which benefit members directly without contributing to the service of supplying the irregular needs of proprietary handlers for fluid milk. One association is itself engaged in retail distribution, another association supplies directly the total fluid milk needs of all the food stores in the Boston marketing area of a large chain grocery organization. A variety of special contractual relationships with proprietary handlers exists among certain other of the cooperative associations. Because of these variations, certain associations are better adapted to, and do, perform much more of the service of supplying the irregular needs of handlers for fluid milk than do other associations.

In recognition of the wide variation in the degree to which different cooperatives, both bargaining associations and operating cooperatives, perform services of benefit to all producers, as distinguished from services which inure to the benefit of only their members, the payment plan should contain provisions that prevent pay-

ments being made for activities that benefit only the members of the cooperative.

The payment at the rate of not more than 1½ cents per hundredweight, in addition to being limited to cooperative associations that meet rigid qualifications with respect to organization and performance, should also be expressly limited to an amount not more than one-half of the cost to such association for meeting the specified qualifications. Specified qualifications should include the following: The cooperative should be duly organized under the laws of a State; it should meet the requirements of the Capper-Volstead Act; it should operate as a responsible producer-controlled marketing association and exercise full authority in the sale of milk of its members; it should systematically check weights and tests of members' milk and guarantee their payments for milk. Although these requirements pertain to activities that directly benefit members only, such requirements are necessary for an association to be able to engage in other activities in connection with the marketing order that are of benefit to all producers. For this reason the payment allowed should be limited to not more than one-half of the total expenses of the association. This is insurance against an association using its payment under the order to defray the cost of activities that benefit members only.

The requirements under the payment plan should also provide that an association must maintain a competent staff for dealing with marketing problems and provide information to its members with whom a close working relationship is constantly maintained. In addition, it should be able to cooperate with other similar associations in
 26 activities incident to the maintenance and strengthening of collective bargaining by producers and the operation of a plan of uniform pricing of milk to handlers. If these latter requirements are met, there is assurance that the associations are performing the desirable service of adequately representing producers' interests both at hearings to amend the order and in other ways relating to the administration of the order, and that constructive educa-

tional work with respect to helping producers understand and interpret the order can be accomplished.

The provision allowing payment at the rate of 5 cents per hundredweight on certain types of sales of Class I milk to proprietary handlers should likewise be limited in order to prevent the payment from applying to activities that benefit members only. The plan should exclude from payment any sales of milk to stores, to handlers in which the cooperative has any degree of ownership, and to a handler with which the cooperative has sales arrangements that result in the cooperative's reserve milk being unavailable to other handlers as fluid milk.

In the absence of this type of payment plan, the activities of cooperative associations that are of benefit to all producers have resulted in lower prices for milk to members of the association than to other producers, because the cost of performing these services has had to be assessed against the value of members' milk. Bargaining associations with a program sufficiently extensive to enable them to be performing services for the entire market have required dues of 3 cents per hundredweight of members' milk. One cooperative that has performed the major part of the service of supplying the irregular needs of handlers for fluid milk has had to deduct 10 cents per hundredweight of members' milk to defray association expense.

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A comparison of the costs of operating milk handling facilities by proprietary handlers and by cooperatives shows that the cost to cooperatives of supplying the irregular needs of proprietary handlers for fluid milk is definitely related to the inability of such cooperatives to return prices to their members comparable with prices received by non-member producers. Many of the cooperative associations have to operate their plants at a cost higher than the cost of operating similar plants owned by proprietary handlers. The cooperatively owned plants supply the irregular demands for fluid milk. This activity results in a cost of plant operation that is higher than average for the market. The volume of milk remaining in such plants for manufacture is extremely irregular and un-

dependable. This variation in volume prevents efficient utilization of plant capacity and prevents the plant operators from marketing their manufactured products on the basis of long-term contracts.

For the purpose of pricing milk and providing proper handling allowances, the payment plan should separate the costs associated with providing the services to the market from the allowance for the additional cost of receiving milk at country plants rather than directly at city plants. The provisions for payments to cooperative associations are needed equitably to apportion the total value of milk among producers.

H. L. FOREST.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 25th day of November, 1941.

DORATHEA E. WALLNER,
Notary Public.

My commission expires Nov. 1, 1942.

28 Filed February 11, 1942, Charles E. Stewart, Clerk

AFFIDAVIT OF L. A. COOLEY

L. A. Cooley, first being duly sworn, deposes and says:

I am the L. A. Cooley referred to on page 11 of the affidavit of H. L. Forest, filed in this case, and have prepared the following affidavit at the request of the plaintiffs herein. I am Manager of the Country Department of the Whiting Milk Company, a position which I have held for the past twelve years. My prior experience includes two years as Director of Markets for the State of Vermont; two years as General Manager of Atlantic Coast Poultry Cooperative Association of New York City; two years as Secretary of the New Jersey Farm Bureau, and seven years as County Agricultural Agent in New Jersey. I was graduated from the New Jersey Agricultural College in 1917, with a B.Sc. degree, having majored in Dairy Husbandry and Agricultural Economics, and took a course of graduate study

in Agricultural Economics at Columbia University during the academic year 1926-1927.

In the course of my duties in the foregoing positions, I have been familiar with the operation of the Greater Boston milk market for the past fifteen years. In particular, it has been my duty to become thoroughly familiar with the economic factors influencing the supply of milk to the Boston market from the northern New England milk-shed and the factors affecting the distribution and resale prices of fluid milk and of manufactured milk products. I have been familiar with the Federal control of milk in the Boston marketing area by means of Order No. 4 since its promulgation and throughout its various amendments, and have likewise been familiar with the control of resale prices in the Boston market by the Massachusetts Milk Control Board. I attended and testified at the hearings held by the Secretary of Agriculture in October 1940 and May 1941 when the proposal for payments to cooperative associations was introduced and on the basis of which § 904.9 was incorporated in Order No. 4.

I have examined the pleadings filed in this case and am familiar with the affidavit of H. L. Forest filed herewith supporting the defendant's motion for summary judgment. In certain respects the material facts bearing on the issues in this action and the conclusions to be drawn therefrom differ from those set forth in that affidavit.

1. The effect of the cooperative payments on the individual plaintiffs.

Section 904.7(b)(5) of Order No. 4 provides for deducting the amount of the monthly payments to cooperatives from the total value of the pooled milk before computing the blended price. The defendant's affidavit states that the resulting reduction in the blended price does not necessarily affect the plaintiff producers since they are free to market their milk for more than the blended price. This is not true.

The price which any handler can afford to pay for the milk he receives from producers is limited by the resale prices which he can obtain for his products. The market

30 for manufactured milk products (butter, cheese, condensed and evaporated milk, casein, etc.) is a national market; therefore, resale prices for such products are competitively determined on a nation-wide basis, in which the supply of milk and milk products from the Middle West is an important factor; and no single handler or group of handlers in the New England market can influence such prices materially.

The resale price for fluid milk in the Boston market is determined primarily by orders of the Massachusetts Milk Control Board. Prior to the establishment of the Control Board, competition in the Boston market was intense and price-cutting in the retail market resulted in a depressed return to producers throughout the milk-shed. Minimum resale prices were therefore established as a necessary corollary to Order No. 4. Today competition in the market remains intense, and necessarily forces the price for fluid milk down to the minimum set by the Control Board. No handler in the market is in a position to establish a higher price for his ordinary market milk.

Order No. 4 sets the value of Class I and Class II milk which the handlers must pay into the pool. Essentially the "value" of milk is what the handlers can afford to pay and still stay in business, and is directly related to the resale prices of Class I and Class II milk. The handler's margin under the Boston order is one of the lowest for any major market in the country; indeed, the bankruptcy of two of the more important handlers in the market since Order No. 4 became effective underscores the need for careful and efficient operation, and makes it plain that no handler can afford to pay a premium for his milk in excess of the prices set by the Order. Moreover, no handler could pay a premium to the individual plaintiffs in this suit without offering the same price to all his producers. In

31 Vermont, state legislation forbids such discrimination; and, as a practical matter, the maintenance of uniform prices to all producers is essential, both there and elsewhere, to preserve the handler's reputation for fair dealing.

These statements are borne out by the experience of one of the larger proprietary handlers in the Boston market who in the spring of 1941 offered his producers a premium of 10¢ per cwt. above the blended price; the offer was withdrawn within a few months and the handler publicly stated that it had already resulted in a loss of \$15,000, and would be ruinous if continued. A similar offer by one of the cooperatives was likewise withdrawn.

Not only is it impossible for a handler to pay his producers a premium over the blended price, but it is the whole theory of the equalization pool that this should not be done. The function of the pool is to return uniform prices to all producers, regardless of whether the handler to whom they sell disposes of his milk at the higher prices obtaining in the fluid milk market or is engaged primarily in manufacturing operations. If a premium were offered by the handlers to whom the plaintiffs sell, amendments raising the value of Class I milk would promptly absorb the plaintiffs' additional return into the pool for the benefit of all producers throughout the marketing area.

The defendant's affidavit states, nevertheless, that many producers in the Boston market are now selling their milk at substantial premiums above the blended price, and suggests that the plaintiffs in this suit may obtain a similar increase of price for their milk. In fact, the premiums paid are only for quality milk, which may be sold in the Boston market at a price above the resale price for ordinary fluid milk. Grade A milk is the best-known type of quality milk; it must, however, be produced under exacting requirements set out in the Massachusetts statutes. None of the plaintiffs is now equipped to meet these requirements, and none

could do so without a substantial additional investment in his farm and dairy equipment. Moreover, there is currently a surplus of Grade A production over the amounts necessary to supply the market. As a result no handler would be willing to take on the plaintiffs as additional Grade A producers. A similar premium is paid for Guernsey milk because of its greater resale value; but none of the plaintiffs produce such milk. It should be

pointed out, moreover, that every premium for quality milk which has been paid since regulation by Order No. 4 became effective has been a premium over and above the blended price. As a result, the amount received by the producer, even for quality milk, varies directly with any change in the blended price.

In point of fact, each of the plaintiffs in the present action is now receiving the blended price as announced from month to month by the Market Administrator. None of them is in a position to obtain a premium for his milk beyond that price. Any reduction in the blended price, therefore, such as the deduction for payments to cooperatives, has the immediate effect of reducing his income.

The defendant's affidavit states that the amount of the deduction in August, 1941, cannot be taken as a fair guide to the amount which will actually be required in each month for payments to cooperatives. In that month the Market Administrator deducted \$15,575.31 to be held in reserve for payments to cooperatives later qualified by the Secretary of Agriculture. In the months from September through December, 1941, a deduction for such payments was also made; though the exact amount is combined with other figures in the Market Administrator's announcements, it has been announced publicly that \$15,000 has been received in each month for this purpose. In addition, since the date of the defendant's affidavit, it has been announced that seven of the twenty-two cooperatives for whom a reserve has been established have been qualified by the Secretary of Agriculture.

33 The estimated deliveries of these cooperatives amount to 55% of the annual cooperative deliveries in the equalization pool. On this basis, \$8,500 of the reserve set aside in August, 1941, is now earmarked for actual payment, and will result in a deduction of .85 cents from the blended price. Moreover, giving effect to the monthly fluctuations of deliveries as shown by the total volume in the equalization pool, the following estimated payments in 1941 will now be required:

August	\$ 8,500
September	7,200
October	6,800
November	6,000
December	6,400

5 months' total \$34,900

Based on 1941 figures, the monthly payment for the co-operatives thus far qualified would have amounted to an annual total of \$95,000, varying from a low in February of \$4,900 to a high in May of \$10,000. There is reason to believe that further co-operatives will soon be qualified, and in any event payments in 1942 will probably be increased above these figures, since the co-operatives receiving such payments will be in a position to divert membership from those which have not been qualified, and will, in addition, intensify their efforts to increase their membership among present non-member producers.

It is also stated in the defendant's affidavit that it is impossible to determine whether the plaintiff producers would receive more or less than the blended price in the absence of the Order as now amended. This statement incorrectly assumes that the plaintiffs in this action are attacking the validity of the entire order, whereas they are objecting only to the payments to cooperative associations. It is obvious that if the deduction from the

34 pool for those payments was improperly made, the blended price has been decreased proportionately and the plaintiffs' returns for their milk have been decreased by that amount per hundredweight (i.e., 1.55¢ in August, 1941).

The statement in the defendant's affidavit that marketing elements resulting from the amendments would have been absent under a plan of marketing in which cooperative payments were not included, and that therefore it is impossible to determine the blended prices which might otherwise have been announced as payable to the plaintiffs, is incorrect because such other marketing elements are non-existent and were non-existent prior to the promulgation of the present Order. The payments purport

to be based upon activities which have been rendered for many years; there is no evidence that in the absence of such payments such activities would cease. In fact, in the absence of such payments they have not ceased and will continue, for reasons which more fully appear below.

2. *Extent of market-wide services rendered by cooperatives.*

The defendant's affidavit purports to summarize the evidence before the Secretary of Agriculture with regard to the extent of market-wide services rendered by the cooperatives. An examination of the record indicates that neither the nature of these services nor the extent to which they benefit non-member producers was clearly defined by the evidence. In fact, no economic justification exists for the proposed payments to cooperatives.

The defendant's affidavit classifies the market-wide services allegedly rendered by the cooperatives under two major headings: (a) legislative activities in securing amendments to the Order, together with educational work among producers with respect to the operation of the Order; and, (b) manufacturing operations during flush season to supply an adequate reserve of fluid milk during short seasons.

35 (a) *Legislative activities, research and educational services.*

It is stated that the cooperatives have played the leading role in securing the amendments to the Order which raise the value of milk to be paid by the handler, and hence have benefited the producer by increasing the blended price which he is entitled to receive. Further, it is stated that the research and executive staffs of the cooperatives make it possible for them to take a more active and informed part in the hearings than individual farmers or non-member groups. The record does not substantiate the sweeping implications of these statements.

It is, of course, true that the cooperatives have been active in securing amendments to the Order. Often, however, the

proposals which have been most strenuously labored have been provisions which benefit the cooperatives exclusively. The present provisions for payments to cooperatives is of course an example. Another example is the proposal of the cooperatives to extend the present butter class from the three months of the flush period to a year-round basis. This proposal would permit the cooperatives to pay lower prices for milk going into butter and permit them to make long-term arrangements to manufacture butter. Such arrangements would not only increase the amount of cream brought in from New York and the Middle West, but would also withdraw milk necessary for the fluid market during the short season. Although the cooperatives and their member producers might benefit from profitable butter operations, producers generally would be injured by the reduction of the blended price caused by the diversion of cream to the less valuable butter class.

Other examples can be multiplied of legislative activity by the cooperatives for amendments which would be of exclusive benefit to their membership at the expense of the non-member. On the other hand, the record abundantly

36 illustrates that non-members have been quite as active as the cooperatives in presenting evidence on proposals for price increases, which benefit all producers in the market rather than a group with special private interests. Moreover, the record indicates clearly that the research functions of the cooperatives have not made available to the Secretary any important independent studies of market conditions. On the contrary, most of the basic statistical data has been presented at the hearings by the Department of Agriculture and by the Market Administrator and his staff. By far the major portion of the statistical evidence introduced by the cooperatives has been taken from published releases of the Department of Agriculture and of the Market Administrator, and from publications by the research staffs of the New England Agricultural colleges.

Under the foregoing circumstances, it seems clear that the record is inadequate to establish any market-wide benefits from the legislative and research services claimed to be

rendered by the cooperatives. In addition, the record is barren of any evidence to support the claim that the cooperatives render service to the market by educating producers in the operation of the Order. In fact, the field activities of the cooperatives consist largely in the solicitation of new members, whereas educational efforts have been handled primarily through extension services of the agricultural colleges, which have not only published interpretive bulletins, but have also conducted meetings of producers from time to time to explain the operation of the Order in an unbiased way.

(b) *Insuring a reserve supply of fluid milk.*

Taken as a whole, the operating cooperatives in the Boston market handle a greater proportion of surplus milk (Class II milk, used for manufacturing dairy products rather than for fluid milk) than the proprietary handlers, whose sales are predominantly of fluid milk. In the
37 short season, the fluid milk market may absorb all or a large proportion of the proprietary handlers' available milk, with the result in some seasons that their requirements are met by purchases from the surplus of the cooperatives of milk which they may normally have used for manufacturing purposes. Since the maintenance of a high volume of fluid milk sales tends to stabilize the blended price at a higher level, for the benefit of all producers, the cooperatives are said to be rendering gratuitously a market-wide service to which non-members should be forced to contribute.

The position of the cooperatives in the market should be considered in its historical setting. The first operating cooperatives were organized in the 1890's primarily to provide the separating facilities necessary for cream and butter operations. Later, with the development of modern transportation facilities, the cooperatives sought outlets to the fluid milk market by offering to supply the needs of the retail distributors serving the Boston market. Since the demand for fluid milk is relatively inelastic, however, the manufacturing operations of the cooperatives were not

eliminated, even when an increasing proportion of their milk was sold for fluid distribution, though such operations tended to be concentrated more and more during the flush season.

This in essence is the position of the operating cooperatives today. The "service" to the fluid market, which they have undertaken voluntarily, consists merely in seeking the most lucrative outlet for their milk by selling it to proprietary handlers for retail distribution. The defendant's affidavit suggests that the equalization of prices under the Order has destroyed any incentive to continue this "service" to the market. This statement overlooks the fact that Federal regulation of the Boston market may at any time be terminated and equalization thereupon cease. It is,

therefore, a very real concern of each cooperative
38 to maintain its fluid outlets against the day when,

if Federal regulation is withdrawn, it may lose its producers to other handlers whose higher prices reflect a greater participation in the fluid market. Furthermore, cooperative associations having acquired the business of selling milk to certain handlers as an outlet for their members' production, must continue such sales and to maintain facilities therefor or else risk losing customers for such production.

The seasonal fluctuation of manufacturing operations is not, of course, a problem peculiar to the cooperatives, nor do they provide the only outlets for surplus milk during the flush season. Proprietary handlers who have country stations maintain comparable manufacturing equipment, and are subject to similar overhead costs from machinery which stands idle in the short season when the surplus milk is diverted to supply the fluid market. Their surplus operations, no less than those of the cooperatives, are essential to preserve the necessary reserve against the fluid requirements of the short season. Indeed, public testimony has revealed a dramatic example of a stand-by service rendered by one of the largest proprietary handlers in making available a reserve supply of fluid milk. In 1941 that company had undertaken to manufacture the entire output of two

cooperative plants, but, at the request of the cooperatives, released the milk to them for sale in the fluid market during the short season. There, in fact, the proprietary handler incurred the expense of idle machinery during the short season with no compensating sales of fluid milk in other periods.

The record, on the other hand, contains no evidence indicating the extent to which the cooperatives actually make fluid milk available for emergency purchases by proprietary handlers. Such figures as were given by New England Dairies, the largest group of operating cooperatives in the market, indicate merely the number of proprietary handlers

39 purchasing fluid milk during all or a part of the year, and indicate that the number of such purchases increases during the short season. No figures were given as to the total volume of milk furnished to proprietary handlers for the fluid market. Moreover, no figures were given to indicate the volume regularly supplied to proprietary handlers throughout the year, as distinguished from the volume of emergency purchases. In fact, emergency purchases are made in large part to supply secondary markets rather than the Boston market. Other cooperatives refused to put in even the limited information furnished by New England Dairies to establish the extent of their activities in maintaining an available reserve of fluid milk for emergency requirements in the Boston market.

Similarly, there is nothing in the record to show that the cooperatives have been put to additional expense by absorbing in manufacture the necessary surplus to insure an adequate reserve of fluid milk during the short season. There is nothing in the Order which prevents the cooperatives from charging a premium on emergency sales to proprietary handlers, and in fact testimony on behalf of New England Dairies indicated that, in part at least, its sales to proprietary handlers were made at prices above the Class I values established by the Order. By this method, therefore, the cooperatives have been able to recoup any possible losses resulting from manufacturing facilities made idle by the emergency requirements of the fluid market, and a

market-wide assessment of all producers in the pool is unnecessary.

In addition, there is abundant evidence in the record to indicate that the present Class II prices make it possible for the cooperatives to manufacture surplus milk on a thoroughly profitable basis, even after taking into consideration the seasonal fluctuation of such operations. In fact, the

40 Class II prices set in §904.4(b)(2) of the Order are based on the prevailing prices for cream, skim milk, and casein, but with a further deduction, known as the "station allowance," sufficient to absorb the cost of maintaining and operating country stations and the necessary equipment for manufacturing operations, and any additional costs involved in supplying the emergency requirements of the fluid market. The station allowance, based on an analysis of average costs, completely compensates to the cooperatives for their expenses in carrying such equipment, after allowing fully for the overhead cost of machinery made idle by seasonal fluctuations in the volume of Class II milk available for manufacture and possible diversions of milk to the fluid market in short seasons.

The record shows without dispute, moreover, that there is intense competition by all handlers throughout the milk-shed for additional volumes of milk for manufacturing purposes. No such efforts to obtain additional surplus milk would be made unless profitable manufacturing operations were assured. Indeed, it is common knowledge that at least one large cooperative has become increasingly reluctant to expand its fluid milk sales at the expense of its manufacturing operations; this policy is reflected in its refusal to renew an existing year-round contract to furnish fluid milk to a proprietary handler except at a substantial premium above the Class I price. It may also be noted that, although the cooperatives have furnished figures showing their expenses involved in manufacturing operations, no net figures were submitted indicating whether they resulted in a profit or a loss; and further that the operating cooperatives refused to reveal the amount of their dividends as compared with their deductions for dues.

There is no evidence in the record to show that the reserve necessary to supply the market in the short period would be endangered if the five cent payment provided for by Section 904.9 were not made. In fact this reserve has been maintained in prior years without any such bonus payment. No demand for fluid milk has ever gone unsatisfied, even in emergency periods of shortage, and in fact no subsidy to the cooperatives has been thought necessary to insure a reserve supply of milk. Eighteen markets are now operating under Federal orders containing equalization pools; yet provisions for cooperative payments have been included only in the Boston and New York orders. Nevertheless, the fluid milk requirements of all these markets have been fully met even where no special bonuses have been paid to the cooperatives. Indeed, the primary purpose of the equalization pool itself is to return a price to marginal Class II producers sufficient to insure a sufficient surplus production to maintain the fluid market during the short season. It is clear that this object was fully realized in the Boston market before the introduction of cooperative payments, since the published figures of the Market Administrator for the years 1940 and 1941 indicate that 50% of the milk in the pool is accounted for as surplus.⁴ That orderly marketing and an adequate milk supply will continue even if the cooperative payments are eliminated from the Order is also shown by operations since August, 1941, for no payments have as yet been made by the Market Administrator pursuant to §904.9. During that period, moreover, fluid milk sales in the Boston market have shown a variation of less than 4%; while the volume of surplus milk in the market has varied from 111,085,197 lbs. in August to 77,404,605 lbs. in November. With a potential reserve of such proportions available to supply emergency requirements in the fluid market, it is clear that the cooperative payments are unnecessary. Indeed, there is no

⁴ The monthly figures for 1940 and 1941 show that the proportion of surplus milk has never been less than 31.5% of the total in the pool (month of November, 1941) and has amounted to as much as 63.5% of the total (month of June, 1940).

42 economic justification for the payments to the co-operatives for a service for which their members have already been compensated, and which under the present terms of the Order is a profitable operation. Any losses which the cooperatives may incur from manufacturing operations have resulted from inefficient methods, and the payments provided for by \$904.9 will tend merely to perpetuate such uneconomic operations in the market.

3. *Basis for the allowances to cooperatives.*

There is no evidence in the record to indicate the basis on which the payments to the cooperatives were determined, or any correlation between the amounts specified by the Order and the net cost of the services to the cooperatives. The largest bargaining cooperative in the market, which is the chief beneficiary of the $1\frac{1}{2}$ -cent payment, submitted an estimated allocation of its total departmental operating costs to be charged to the market rather than to its members exclusively. No explanation was offered for the percentages adopted in making this allocation. The defendant's affidavit, on the other hand, points out that the $1\frac{1}{2}$ -cent payment was fixed at half the present dues of this cooperative, 3 cents (of which 1 cent is earmarked exclusively for member-benefits in guaranteeing payments from handlers in the event of insolvency). No other correlation between the $1\frac{1}{2}$ -cent payment and the cost to the bargaining cooperatives of rendering market-wide services is shown by the record.

Similarly, the operating cooperatives submitted figures showing the annual expense to an "average" cooperative of maintaining manufacturing facilities to handle surplus milk. No figures were submitted showing revenues from such operations, or any figures which would indicate whether a net profit or loss was realized. The amount of cooperative dividends paid by many of the operating cooperatives was withheld. The amount of dues of one cooperative was stated to be 10 cents (of which 3 cents are in fact earmarked for capital investment). No other correlation between the 5-cent payment and the cost to the

43 operating cooperatives of supplying fluid milk to proprietary handlers during the short season is shown by the record. Indeed, one of the cooperatives already qualified by the Secretary of Agriculture will receive 5 cents on all milk regularly supplied to a proprietary handler under a long-term contract, a result wholly inconsistent with compensating the cooperative for releasing surplus milk for the emergency needs of the fluid market.

4. *Base-rating provisions.*

The defendant's affidavit and other papers filed in this case assume that the payments to cooperatives are authorized by the language in the Act commonly referred to as the "base-rating provision."

The base-rating provision occurs in §8c(5), which specifies the various provisions which may be included in a milk marketing order. Subsection (B) provides for setting up the mechanics of an equalization pool in order to return a uniform price to all producers per hundredweight of milk delivered. The uniform price may, however, be subject to certain differentials, depending on quality, location from the market, and the like, and may also be subject to:

" . . . (d) a further adjustment equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time."

Base-rating has long been established in the dairy industry, not only in New England but in other parts of the country as well, as a convenient method for equalizing the benefits of the fluid market among the various producers in a pool. The "base" assigned to each producer is the volume of milk for which he will be paid the Class I price. Deliveries in excess of his base constitute surplus, and are paid for at Class II prices. Prior to Federal regulation, the "pool" consisted of the various producers delivering

to a single handler, or, in some cases, of all the producers marketing their milk through a single bargaining
 44 cooperative. In either case, the normal fluid outlets of the pool determined the total amount of milk which could be paid for at Class I prices and hence the total of the bases. The allocation of bases to individual producers was then made in proportion to their deliveries during some representative period. Since payment to producers on the basis of base-ratings offered an incentive to even production throughout the year, it provided advantages which could not be obtained by a system of uniform pricing for all milk to all producers.

Base-rating systems have been in effect in the Boston market since 1930, operating for the most part through the pool of producers represented by New England Milk Producers Association, the largest, and for a time the only, bargaining cooperative in the market. A refinement of this earlier practice was incorporated in the licenses issued under the authority of the Agricultural Adjustment Act in 1933 and 1934, and was likewise made a part of Order No. 4, as originally promulgated on February 9, 1936. At that time, the economic brief of the Dairy Section of the Department of Agriculture in support of the order explained that the purpose of the base-rating provisions was:

"equitably to apportion, according to production during a representative period of time, the total value of milk for each delivery period Thus, the plan of making each producer's base equal to his production during the short season of production is an equitable method of pro-rating the fluid milk market among producers That the base rating plan is a commonly accepted market mechanism is evidenced by the large number of milk markets wherein the proceeds of sales to handlers are pro-rated to producers through the base rating plan"

Similar base-rating provisions have been included in the orders regulating the milk markets in Fall River, Massa-

chusetts; St. Louis, Missouri; Kansas City, Missouri; and La Porte County, Indiana:

The base-rating provisions of Order No. 4 were later eliminated in the revision of the order effective
 45 August 1, 1937, upon a finding by the Secretary as follows:

"2. That in view of changes in economic conditions since the date of the original findings, the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for milk so delivered, without the use of a base-rating plan, but with the inclusion of special location differentials, is a fair and reasonable method of distributing to producers the proceeds of sales of milk to handlers"

This change was further explained in the Dairy Section's economic brief as follows:

"A study of the comparison of returns to different types of producers under the proposed plan and those under the rating plan effective in Order No. 4, reveals that the two are perhaps not radically different. In the study, a sample of approximately 15 per cent of the producers in the market was taken. These producers were classified as even or uneven. Even producers were defined as all those producers whose deliveries in the quarter of the year in which their daily deliveries were lowest were at least 70 percent of their deliveries in their highest quarter.

It was found that only around one-fifth of the producers in the market could be called even under this definition. These even producers were scattered throughout the milkshed so that, for the most part, their evenness was completely offset by the irregularity of their neighbors. (See table 38.) Only in the nearby zones was there a preponderance of even producers so that, as a group, they showed even deliveries. Nearly two-thirds of the producers located within 40 miles of the market were classified as even. The average of their low-quarter deliveries as a group was over 70 percent of their high-quarter deliveries. Over 50 percent of the producers located between 40 and 80 miles were classified as even, and they, as a group, had an average of nearly 70 percent. No other zone group had

an average of 62 percent. It is proposed that these two groups of producers—that is, those located within 40 miles of Boston and those located between 40 and 80 miles—be given location differentials of \$.36 and \$.18 per hundredweight, respectively.

It is thought that the proposed plan, which gives consideration to those producers located nearby the market who are preponderantly even and who as a group have very uniform deliveries, and which returns a price higher than the average to the other even producers, accomplishes the purpose for which the rating plan in Order No. 4 was intended."

These location differentials have been retained in §904.8(e) of Order No. 4 as now amended. In addition, vestiges of the original base-rating plan have survived in §904.8
46 (b)(2), which provides that new producers shall be paid at Class II prices rather than at the blended price announced by the Administrator.

It has heretofore been generally assumed that base-rating, as commonly understood in the dairy industry, was covered by §8(c)(5)(B)(d) of the Act, quoted above. Indeed, this statutory language has had this meaning and no other since the Act became effective. Cooperative payments, on the other hand, were unknown in the dairy industry when the Act was written, and, as shown by the defendant's affidavit, such payments purport to be based on services to the market, a subject neither directly nor indirectly related to base-rating.

In fact, the alleged services described in the defendant's affidavit are no part of the "total value of milk to be equitably apportioned among producers and associations of producers on the basis of their marketings during a representative period of time." The provisions for payments to cooperatives merely constitute an effort to apportion cooperative expenses, for, as is stated in the defendant's affidavit, the payments are conceived primarily as a means of defraying the cost to the cooperatives of their legislative activities and the cost of supplying the irregular demands of proprietary handlers for fluid milk. The value of the total milk to be apportioned, on the other hand, is specifi-

cally found to be equal to the Class I and Class II prices set by the Order, for which each handler must account to the Market Administrator. This value is entirely independent of any costs incurred by the cooperatives.

Respectfully submitted,

L. A. COOLEY.

February 7, 1942.

Subscribed and sworn to before me, a Notary Public in and for the Commonwealth of Massachusetts, this seventh day of February, 1942.

DONALD G. ALLEN,
Notary Public.

My commission expires Jan. 18, 1946.

47 Filed Feb. 11, 1942, Charles E. Stewart, Clerk

AFFIDAVIT OF DELBERT O. STARK

STATE OF VERMONT,
County of Orange:

DELBERT O. STARK, one of the plaintiffs in the above entitled action, first being duly sworn, deposes and says:

I have been selling milk from my dairy to Whiting Milk Company for over six years. I deliver to Whiting at their station in Randolph, Vermont, and the milk is shipped to them in Boston for use in the Boston market. Whiting pays me the blended price as figured by the Boston Milk Administrator, and I have been getting that price ever since the Federal Order went into effect. I have always wanted to get more for my milk, but there has never been any way of doing so. If I delivered to the United Farmers Plant in Randolph I would get the same price. If I delivered to the Bethel Cooperative Creamery at Bethel, Vermont, I would have to pay for seven miles of extra haulage and would take a deduction of 10 cents per cwt. for dues. None of the dealers or coops in the Randolph area has offered to pay better than the blended price, except for Grade A

milk. If I went into quality milk I would first have to spend over \$200 to fix over my dairy. Besides, there is no market for quality milk any more, and the dealers are not taking on new Grade A producers.

I am opposed to the coop deduct because I cannot see that the coops are doing anything to benefit anybody but their own members. With the Federal

Order in effect I know I will get a fair price for my milk and the same as everyone else in the market. Whiting and the Market Administrator's announcements keep me informed of changes in the Boston price and changes in the Federal Order; and the regular publications of the Department of Agriculture keep me up to date on new ideas in dairy operation. In fact, from attending some of the hearings on the Boston Order, it seems as though the Department of Agriculture is performing most of the services that the coops claim to be rendering. From what I have seen, it looks as if the coops want some extra money and are trying to make the non-members join up whether they want to or not.

DELBERT O. STARK.

Randolph, Vermont, February 7, 1942.

Subscribed and sworn to before me, a Notary Public in and for the State of Vermont, this 7th day of February, 1942.

[SEAL]

PHILIP A. ANGELL

My Commission Expires: Feb. 10, 1943.

50 Filed, Mar. 7, 1942, Charles E. Stewart, Clerk

ANSWER

Claude R. Wickard, Secretary of Agriculture of the United States, answering the complaint exhibited against him herein, respectfully shows unto the Court:

First Defense

1. The complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense

2. The defendant admits the allegations of paragraph 1 of the complaint with respect to the citizenship and residence of the plaintiffs; but avers that the essential elements of a class action are lacking and denies that plaintiffs herein may prosecute this case "for the benefit of all other persons similarly situated".

3. The defendant admits the allegations of paragraphs 2, 3, 4, 5, 6, 8, and 9 of the complaint.

4. The defendant admits the allegations of paragraph 7; except the allegation that "all other producers whose milk is marketed pursuant to said Order No. 4 are paid the blended price as computed and announced by the Market Administrator pursuant to section 904.7"; the allegation that sub-paragraph (b)(5) of Section 904.7 of the order lacks "authority therefor"; and the allegation that the deductions therein mentioned are "unauthorized and illegal", which allegations are denied. With respect to the first of said allegations denied as aforesaid, the defendant avers that many of the producers whose milk is marketed pursuant to Order No. 4 have demanded, and have been paid by handlers, prices higher than the announced blended price.

5. The allegations of paragraph 10 are admitted, except that it is denied that, at the time of the filing of the complaint, the Secretary of Agriculture had determined that certain cooperatives were qualified and entitled to receive payments; and that any such payments were made on or before September 25, 1941.

6. The allegations of paragraph 11 of the complaint purport merely to set forth the requirements of certain provisions of Order No. 4, as amended, and are admitted to the extent that they are not inconsistent with such provisions.

7. The allegations of paragraph 12 of the complaint are denied, except that it is admitted that the Market Administrator, in making the computations as required under

Order No. 4, as amended, for the period August 1-31, 1941, set aside a reserve of \$15,575.31 to cover any payments required to be made for such delivery period pursuant to Section 904.9(b) of Order No. 4, as amended; that the monthly deliveries made by the plaintiffs range, respectively,
 52 from 7,000 pounds to 26,000 pounds. Further answering said paragraph, defendant avers that, although the computations by which the plaintiffs reach the figure of 1.55 cents per hundredweight mentioned in said paragraph 12 appear to be mathematically correct, it does not follow that the blended price established under the order as the minimum price payable to the plaintiffs for milk would be 1.55 cents higher in the absence of the amendments complained of. The amount of the blended price is the result of the operation of the entire plan for orderly marketing embodied in the federal order. It is impossible to establish that in the absence of one element of the plan the remaining elements will operate without change. The conclusion reached by the plaintiffs that, on the basis of the volume of milk which they regularly deliver, the payments to cooperative associations authorized by the amendments will result in annual losses to the individual plaintiffs ranging from \$10.50 to approximately \$39.00 per year is not supported by adequate premises because the computation by which the alleged rate of reduction of 1.55 cents per hundredweight is reached is based on the blended price achieved by the plan of marketing which incorporates the amendments and the incentive to orderly marketing inspired and encouraged by the amendments. Loss to the plaintiffs cannot be shown because it is obviously impossible to determine for the purposes of comparison what the blended price would have been in the absence of such amendments. Furthermore, the announced blended price is at all times merely a minimum price payable to all producers supplying the market and the producer is free to demand and to receive any amount over and above the announced blended price.

53 8. The allegations of paragraph 13 of the complaint

are legal conclusions only, which the defendant is advised he is not required to answer, but, insofar as answer is required, said allegations are denied.

9. The allegations of paragraph 14 of the complaint are denied, except that it is admitted that the defendant intends to perform the duties required of him by the provisions of Order No. 4, as amended.

10. The allegations of paragraph 15 of the complaint are denied.

11. The allegations of paragraph 16 of the complaint are merely legal conclusions which the defendant is not required to answer, but, insofar as answer may be required, said allegations are denied and the defendant avers that, on the contrary, the plaintiffs are not subject to regulation under the Agricultural Marketing Agreement Act of 1937 or Order No. 4, as amended; that the plaintiffs are not required by said act and said order to do or to refrain from doing anything whatsoever, and the plaintiffs are free to demand and to receive from persons purchasing their milk any price which they desire in excess of the blended price announced by the Market Administrator under Order No. 4, as amended.

WHEREFORE, having fully answered the complaint, the defendant demands that the complaint herein be dismissed at the cost of the plaintiffs.

EDWARD M. CURRAN,
United States Attorney.

BERNARD J. LONG,
*Assistant United States Attorney,
United States Court House,
Washington, D. C.*

JOHN S. L. YOST,
*Special Assistant to the Attorney General,
Department of Justice,
Washington, D. C.*

74 Filed Sep. 1, 1944. Charles E. Stewart, Clerk

**MOTION OF DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION,
INC., FOR LEAVE TO INTERVENE AS A PARTY DEFENDANT**

Address of League: 11 West 42nd Street, New York, N. Y.

Dairymen's League Co-operative Association, Inc., moves for leave to intervene as a defendant in the above entitled action, upon the ground that the defense raised by its proposed answer and the relief prayed in its proposed counterclaim, a copy of which is hereto attached, involve questions of law and fact which are common to the main action, and representation of this applicant's interests by existing parties is or may be inadequate, as more fully set forth in the Statement of Points and Authorities hereto attached.

McKENNEY, FLANNERY & CRAIGHILL,
By G. B. CRAIGHILL,

*Hibbs Building,
Washington, D. C.,*

J. BOND SMITH,

*Woodward Building,
Washington, D. C.,*

*Attorneys for Dairymen's League
Co-operative Association, Inc.*

SEWARD A. MILLER,
*11 West 42nd Street,
New York, N. Y.,
Of Counsel.*

80 Filed Sep. 21, 1944. Charles E. Stewart, Clerk

ORDER GIVING LEAVE TO INTERVENE

Upon consideration of the motion of the Dairymen's League Co-operative Association, Inc., for leave to intervene as a party defendant, filed herein on September 1st, 1944; and it appearing to the Court that although copies thereof have been served by mail Sept. 1, 1944, upon the

original parties, no opposition thereto has been filed, it is by the Court this 21st day of September, 1944,

Ordered that said motion be and it is hereby granted; that said Dairymen's League Co-operative Association, Inc., be and it is hereby made a party defendant in the above entitled cause and the proposed answer and counterclaim of said Dairymen's League attached to the motion be treated as its answer and counterclaim filed as of the date of this Order.

DANIEL W. O'DONOGHUE,
Justice.

81 Filed Sep. 1, 1944. Charles E. Stewart, Clerk

ANSWER AND COUNTERCLAIM OF DAIRYMEN'S LEAGUE
CO-OPERATIVE ASSOCIATION, INC.

Defendant-Intervener, Address—11 West 42nd Street, New York, N. Y.

The *Answer* of the DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC., hereinafter called "Intervener," to the complaint filed in the above entitled cause, respectfully states:

1. This Intervener admits the allegations of the first paragraph of the complaint with respect to the citizenship and residence of the plaintiffs.

2, 3, 4, 5 and 6. Intervener admits the allegations of the second, third, fourth, fifth and sixth paragraphs of the complaint, with the exception of the averment in the fifth paragraph that many of the plaintiffs voted against the amendment promulgated on July 29, 1941, to Order No. 4 therein mentioned. Intervener is without knowledge or information sufficient to form a belief as to the truth of said averment.

7. Intervener denies the averment in the seventh paragraph of the complaint that "all other producers whose milk is marketed pursuant to said Order No. 4 are paid the blended price as computed and announced by the Market

Administrator pursuant to section 904.7" and with respect thereto says, upon information and belief, that many
 82 of the producers whose milk is marketed pursuant to Order No. 4 have demanded, and have been paid by handlers, prices higher than the announced blended price. Intervener also denies the averment that sub-paragraph (b) (5) of Section 904.7 of Order No. 4 lacks authority and denies that the blended price announced by the Market Administrator is a result of an "unauthorized and illegal deduction." Intervener admits the other averments of said seventh paragraph.

8, 9 and 10 Intervener admits the averments of the eighth, ninth and tenth paragraphs of the complaint.

11. The averments of the eleventh paragraph of the complaint purport merely to set forth the requirements of certain provisions of Order No. 4, as amended, and are admitted by Intervener to the extent that they are not inconsistent with such provisions.

12. The allegations of paragraph 12 are denied, except that it is admitted that the Market Administrator in making the computations as required under Order No. 4 as amended, set aside a reserve to cover any payments required to be made for each delivery period pursuant to Section 904.9 (b) of Order No. 4 as amended. Further answering, the intervener is without knowledge of the monthly deliveries made by each plaintiff, and therefore, denies the same. Further answering said paragraph the intervener avers that although the computations by which the plaintiffs reached the figure of 1.55¢ per hundredweight, mentioned in said paragraph 12, appear to be mathematically correct, it does not follow that the blended price established under the Order as the minimum price payable to the plaintiffs for milk would be 1.55¢ higher in the absence of the amendments complained of. The amount of the blended price is the result of the operation of the entire plan for orderly marketing embodied in the Federal Order. It is impossible
 83 to establish that in the absence of one element of the plan, the remaining elements will operate without

change. The conclusion reached by the plaintiffs that on the basis of the volume of milk which they regularly deliver, the payments to cooperative associations authorized by the amendments will result in annual losses to the individual plaintiffs ranging from \$10.50 to more than \$39.00 per year, is not supported by adequate premises because the computation by which the alleged rate of reduction of 1.55 cents per hundredweight is reached is based on the blended price achieved by the plan of marketing which incorporates the amendments and the incentive to orderly marketing inspired and encouraged by the amendments. Loss to the plaintiffs cannot be shown because it is obviously impossible to determine for the purposes of comparison what the blended price would have been in the absence of such amendments. Further answering, the intervener says that the announced blended price is at all times merely a minimum price payable to all producers supplying the market and the producer is free to demand and to receive any amount over and above the announced blended price.

13. The allegations of paragraph 13 of the complaint are legal conclusions only, which the intervener is advised it is not required to answer, but, insofar as answer is required, said allegations are denied.

14. The allegations of paragraph 14 of the complaint are denied, except that it is admitted that the Secretary of Agriculture and the Market Administrator have performed and intend to perform the duties required of each of them under the provisions of said Order No. 4 as amended.

15. The allegations of paragraph 15 of the complaint are denied.

84 16. The allegations of paragraph 16 of the complaint are merely legal conclusions which the intervener is not required to answer, but, insofar as answer may be required, said allegations are denied and the intervener avers that the plaintiffs are not subject to regulation under the Agricultural Marketing Agreement Act of 1937, or said Order No. 4 as amended; that the plaintiffs are not required by said Act and said Order to do or to

refrain from doing anything whatsoever and the plaintiffs are free to demand and to receive from persons purchasing their milk, any price which they desire in excess of the blended price announced by the Marketing Administrator under Order No. 4 as amended.

Counterclaim

17. Further answering the complaint, and for counterclaim thereto, Intervener, Dairymen's League Co-operative Association, Inc., says that it is a cooperative corporation duly organized and existing under and by virtue of the laws of the State of New York, and it was organized by and is operating as the marketing agent of producers of milk in the States of New York, Pennsylvania, New Jersey, Vermont, Massachusetts and Connecticut; it is so acting for many thousand producers of milk and has so acted at all times since the enactment of the Agricultural Adjustment Act of August 24, 1935. (49 Stat. 750), as amended and re-enacted by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), described in paragraph 3 of the complaint and hereinafter called, for brevity, the "Act of 1937."

18. Under said Act of 1937, various orders regulating the handling of milk in various areas have been issued by defendant Secretary of Agriculture, among them being Order No. 4, as amended, applying to the Greater Boston Marketing Area, described in the complaint, hereinafter called the "Boston Order," and Order No. 27, as amended, applying to the New York Metropolitan Milk Marketing Area, as amended, hereinafter called the "New York Order." Section 927.7 (e), of the New York Order authorizes payments to qualified cooperative associations of producers similar to the payments authorized by Section 904.9 of the Boston Order to qualified cooperative associations of producers for services rendered by such associations. Said Boston Order and New York Order were issued by the Secretary of Agriculture after findings that they would tend to effectuate the declared policy of the Act of 1937, and such findings were based on

evidence taken at hearings conducted in the manner authorized by said Act.

19. Intervener, as marketing agent for its thousands of producer members, is operating under said New York Order, is now receiving, has received for several years last past, and expects in the future to receive, pursuant to said New York Order, payments of large sums similar in nature to those granted to qualified cooperative associations of milk producers under said Boston Order.

20. Further answering the allegation of the complaint that the defendant Secretary of Agriculture was and is without power under said Act of 1937 to authorize such payments to cooperative associations in and by orders issued by him, this Intervener avers that the Secretary had and has power under said Act of 1937, to authorize such payments to cooperative associations for services rendered by them, and avers that the services so rendered by cooperative associations are beneficial to milk producers who are not members of any cooperative association as well as to those who are members of such associations; that such associations relieve the Secretary and his subordinate, the Market Administrator, of expense and duties which would otherwise be required of the Administrator, and such services by cooperative associations promote orderly marketing programs and tend to effectuate the declared policy and purposes of said Act of 1937.

21. Intervener, as a cooperative association of milk producers, is financially and vitally interested in the principal questions of law and fact raised by the complaint filed by plaintiffs and the answer filed by the defendant, Secretary of Agriculture, and no cooperative association is at present a party to this action or is directly represented herein.

WHEREFORE, Intervener prays:

1. That the prayers of the complaint be denied;
2. That the Court enter a judgment declaring that de-

fendant, Secretary of Agriculture had and has power under the Agricultural Marketing Agreement Act of 1937 to authorize payments to qualified cooperative associations of milk producers for services rendered by such associations and declaring that the provisions of Section 904.9 of said Boston Order and the provisions of Section 927.7 (e), of said New York Order are valid and effective;

3. And for such other and further relief as the Court may deem proper.

DAIRYMEN'S LEAGUE CO-OPERATIVE
ASSOCIATION, INC.

By FRED H. SEXAUER, *President.*
11 West 42nd Street, New York, N. Y.,
Plaintiff.

McKENNEY, FLANNERY & CRAIGHILL,
By G. B. CRAIGHILL,
Hibbs Building, Washington, D. C.
J. BOND SMITH,
Woodward Building, Washington, D. C.
Attorneys for Plaintiff.

SEWARD A. MILLER,
11 West 42nd Street,
New York, N. Y.
Of Counsel.

87 STATE OF NEW YORK,
County of New York, ss:

Fred H. Sexauer, being first duly sworn, on oath deposes and says that he is President of the Dairymen's League Co-operative Association, Inc., a corporation, intervener-defendant, and he is authorized to make this affidavit on behalf of said corporation; that he has read the foregoing answer and counterclaim and knows the contents thereof; that the facts therein stated of his personal knowledge are true and those stated upon information and belief, he believes to be true.

FRED H. SEXAUER.

Subscribed and sworn to before me this 31st day of August, 1944.

MILDRED R. CLARK,

Notary Public.

Mildred R. Clark, Notary Public, Queens County. Queens Co. Clerk's No. 348, Register's No. 181-C-6. Certificates Filed in New York Co. Clerk's No. 672, Register's No. 32. Commission Expires March 30, 1946.

88 We certify that on September 1st, 1944, we served copies of the foregoing motion, points and authorities and proposed answer and counterclaim, by mail, postage prepaid, addressed to the attorneys for plaintiff and for the defendant, as follows:

Hon Francis Biddle, Attorney General of the United States, Department of Justice, Washington, D. C.

Hon. Edward M. Curran, United States Attorney, Court House, Washington, D. C.

Walter J. Brobyn, Esq., Attorney for Plaintiffs, Investment Building, Washington, D. C.

McKENNEY, FLANNERY & CRAIGHILL,

By R. A. Bogby,

Attorney for Dairymen's League Co-operative Association, Inc.

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92 Filed Oct. 2, 1946. Charles E. Stewart, Clerk.

MOTION BY DEFENDANT FOR SUMMARY JUDGMENT

Defendant, By Edward M. Curran, United States Attorney in and for the District of Columbia, pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure, moves the Court that it enter a summary judgment dismissing this action, on the grounds (1) that there is no genuine issue as to any material fact, and (2) that defendant is entitled to judgment as a matter of law.

The grounds on which this motion is based are as follows:

(1) This action is not a class suit within the meaning of Rule 23(a) of the Federal Rules of Civil Procedure.

(2) The provisions of Section 8c(7)(D) of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 608c(7)(D)) constitute a valid delegation of legislative authority.

(3) Sections 904.9(a)-(d) and 904.7(b)(5) of Order No. 4, Order, as amended, Regulating the Handling of Milk in the Greater Boston, Massachusetts, Marketing Area, issued by the Secretary of Agriculture on July 28, 1941, effective August 1, 1941 (6 Fed. Reg. 3762), were issued by him in accordance with the power constitutionally conferred upon him by Congress in Sections 8c(5), 8c(7)(D), 8c(9), 8c(18) and 10(b)(1) of said Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 608c(5), 608c(7)(D), 608c(9), 608c(18) and 610(b)(1)) and are supported by substantial evidence introduced during public hearings thereon, and, therefore, not subject to judicial review.

(4) The pleadings, and admissions on file, together with the affidavits of Thomas G. Stitts, Chester W. Smith and Richard D. Aplin attached hereto, and the certified record of the public hearing held at Montpelier, Vermont, on October 14, 1940; at Augusta, Maine, on October 16, 1940; and at Boston, Massachusetts, on October 17, 1940, and the reopened hearing held at Montpelier, Vermont, on May 14, 1941; and at Boston, Massachusetts, on May 15, 1941, filed in support of this motion, show that there is no genuine issue as to any material fact in this case:

EDWARD M. CURRAN,
United States Attorney,

By _____.

J. STEPHEN DOYLE, JR.,
Special Assistant to the Attorney General,
MARY CONNOR MYERS,
Principal Attorney, Solicitor's Office,
Department of Agriculture, Washington, D. C.

Filed Oct. 2, 1946. Charles E. Stewart, Clerk

94 AFFIDAVIT OF CHESTER W. SMITH IN SUPPORT OF MOTION OF DEFENDANT FOR SUMMARY JUDGMENT

CHESTER W. SMITH, being duly sworn, deposes and says: .

I am a Senior Marketing Specialist, Dairy and Poultry Branch, Office of Marketing Services, War Food Administration. I am a graduate of the University of Maine, having majored in agricultural economics and farm management; and I have a Master's degree in the same subject from Massachusetts State College. I was employed in the Massachusetts State Office of the Agricultural Extension Service, Amherst, Massachusetts, until 1939, when I became a member of the staff of the Dairy Section, Division of Marketing and Marketing Agreements, Agricultural Adjustment Administration, Department of Agriculture (which subsequently was renamed), which is responsible for the administration of the milk provisions of the Agricultural Marketing Agreement Act of 1937, as amended; and I have been assigned particularly to the New England milk markets.

95 Among my duties, since November 1939, have been continuous study of the operation of Order No. 4, regulating the handling of milk in the Greater Boston, Massachusetts, Marketing Area, its interpretation and administration, consideration of proposed amendments, attendance at and participation in all public hearings concerning proposals, digesting of testimony introduced and assisting in formulation of amendments based on such evidence. In that connection, I studied the amendments proposed to provide payments to cooperatives out of the so-called equalization pool set up under the order, attended hearings on ten different dates between October 14, 1940, and May 22, 1941, held either in Montpelier, Vermont, Augusta, Maine, or Boston, Massachusetts, and participated in questioning of witnesses, and I am thoroughly familiar with the contents of the hearing record.

I make this affidavit in support of defendant's motion for summary judgment, and the statements contained herein are based upon evidence which is included in the record of

the aforesaid public hearings and my own personal knowledge.

Eight cooperative associations jointly proposed two types of payments out of the so-called "equalization pool," which represents the total value of all milk sold by producers at prices handlers are required to pay under the order: (1) at the rate of 2 cents per cwt. of milk of members of an association which "furnishes its members market information and verifies the weighing, sampling, and testing of the milk delivered by its members to any handler's plant, and which guarantees payment for such milk of its members," and (2) at the rate of 5 cents per cwt. of milk handled by such associations as "have sufficient plant capacity to receive all the milk of producers who are members and
96 to be willing and able to receive milk from producers not members"

The 2-cent payment was proposed for bargaining cooperatives and the 5-cent payment was proposed for cooperatives operating plants which handle surplus milk, which is the milk produced in excess of the quantity required to supply the fluid milk demand in the marketing area.

The cooperatives proposed that such payments should be made to any cooperative determined by the Secretary of Agriculture to be "(1) having and exercising full authority in the sale of milk of its members; (2) using its best efforts to supply, in times of short supply, Class I milk to the marketing area and to secure utilization of milk in times of long supply, in a manner to assure the greatest possible returns to all producers; and (3) having its entire activities under the control of its members."

To justify issuance by the Secretary of Agriculture of amendments to Order No. 4 providing payments to qualified cooperatives, there had to be substantial evidence introduced during the public hearings (1) that deduction of payments to cooperatives from the value of all milk subject to the order for the purpose of defraying the costs of specified services rendered by qualified cooperatives was incidental to and not inconsistent with other provisions of the Act governing fixing of prices of milk to producers and that

such payments would tend to effectuate the other provisions of Order No. 4; (2) to identify services for which payments appropriately could be made; and (3) to measure the cost of such services. Furthermore, the Secretary had to bear in mind the requirement imposed upon him by Congress, by amendment to the Agricultural Adjustment Act in 1935, to "accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing acts of Congress, and as will tend to promote efficient methods of marketing and distribution;" and also had to bear in mind the price policy of Congress as defined in Section 8c(18) of the Act, that is, "the level of prices shall be such level as will reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk . . . in the marketing area."

The hearing record contains 350 pages of testimony concerning the cooperative payment proposals plus a considerable volume of statistical material supplied by the cooperatives and opponents of the proposals, and several statistical tables introduced by myself on behalf of the Dairy and Poultry Branch, without expression of opinion. Witnesses in favor of the proposed payment provisions included spokesmen for the cooperatives and individual producers and those opposed included individual producers—most of whom spoke for groups in their communities—and representatives of the proprietary handlers. It appeared to myself and to all others assigned to analyze the hearing record that the evidence in support of the contention of the cooperatives that they rendered services of benefit to all producers in the market indicated that the cost of such services is an element in the pricing of milk to producers and justified payment to cooperatives at not to exceed 1½ cents per cwt. of their milk pooled, and payment of 5 cents per cwt. to operating cooperatives on certain Class I milk sold by them.

98 The 1½ cents per cwt. payment provided by

amendment to Order No. 4 is made to all cooperatives certified by the Secretary of Agriculture to be qualified to receive it, including both the so-called "bargaining cooperatives" and the "operating cooperatives," the latter being those which operate milk receiving and manufacturing plants. The 5-cent payment is made only to qualified operating cooperatives.

In support of their contention that they perform services benefiting all producers under the order the cooperatives presented evidence showing performance of the following activities:

Selling of members' milk to handlers;

Guaranteeing members against loss of the value of their milk in case handlers failed to pay;

Finding markets for members' milk whenever their outlet was cut off;

Checking weights and tests of milk produced by their members;

Analysis of marketing problems relative to Order No. 4, including problems which arose by virtue of the operation of other milk orders in nearby marketing areas;

Shifting producers among handlers to adjust supply to seasonal variations in demand by handlers, and in that connection one cooperative leader testified that during the year preceding the hearing his cooperative had made such adjustments to the extent of affecting more than 500 producers;

99 Educational work among producers, including employment of fieldmen who keep in personal touch with producers, individually and in groups, inform them concerning statutes and administrative regulations affecting the marketing of their milk, tell them the type of information concerning local conditions required at public hearings concerning milk orders, and a variety of other duties;

Maintenance of competent staffs continually to analyze the large volume of statistical material published by Federal and State agencies and keep producers informed concerning the application of averages and trends shown by

such statistics to the production and sale of milk in their own communities and concerning current marketing conditions generally;

Propose Federal milk orders and amendments thereto, present evidence on such proposals at public hearings, conduct surveys in connection with various proposals, sometimes send questionnaires to members inquiring about changes in farm wages, grain costs, and other factors in production costs, which become the basis of testimony later presented in public hearings; and

Bring individual producers to public hearings as witnesses, an important service as such producers often provide a variety of information important in the promulgation of milk marketing orders which can be secured from no other source.

Such activities were characterized by one witness, a producer who represented a group of "non-member" producers, as comparable to the services for which citizens pay taxes; that the existence of cooperative plants which would handle the milk in case he should lose his present market is good insurance against losing his market. Testimony of a representative of the Hood Company, one of Boston's principal proprietary handlers, is to the effect that the efforts of bargaining associations to secure higher prices are of benefit to producers who are not members of the association as well as to the members.

From the evidence of the activities noted largely uncontradicted, the Secretary was convinced that substantial benefits to non-member producers were being rendered, in terms of enhancement of prices to producers and promotion of orderly and efficient marketing of milk, both major objectives of the act.

There was testimony relative to identification of services for which payments appropriately could be made which showed necessity for a high standard of performance to be eligible for the payments, lest some cooperatives be indemnified whose activities benefited members only. The record shows, particularly in the testimony of those who opposed the payment plan, that all cooperatives do not have programs of

comparable magnitude and scope and that not all of them are engaged in all the aforementioned activities. The record shows a range from cooperatives which did little more than contract to find a market for members' milk to the markets' largest bargaining cooperative which is engaged in all of such activities. In recognition of this situation, the Secretary of Agriculture required the cooperative approved for payments to be duly organized under the laws of a State, conform to relevant standards of the Capper-Volstead Act, to operate as a responsible producer-controlled marketing cooperative exercising full
 101 authority in the sale of milk to its members, to systematically check weights and tests of members' milk (bargaining cooperatives only), to guarantee members payment for their milk, to maintain a competent staff for dealing with marketing problems, to provide information to members, to maintain close and constant working relations with members, and to collaborate with other cooperatives in endeavors to solve problems relating to the successful operation of the Federal order.

Cooperative costs vary greatly, but the cooperative with the most elaborate program assesses its members 3 cents per cwt. of milk sold to pay for such activities as compared with assessments as low as $1\frac{1}{2}$ cents per cwt. by other cooperatives. Obviously, some of the services enumerated and likewise some required as basis for payment benefit members of the cooperatives only, particularly checking weights and tests and guaranteeing payment of milk. Therefore, the rate of payment under the amendments to Order No. 4 was fixed at not to exceed one-half the highest cost shown or $1\frac{1}{2}$ cents per cwt. instead of the 2-cents proponents requested with the further qualification in the case of bargaining cooperatives, that the rate of payment should not exceed the rate assessed directly against members.

The record also shows evidence of activities of operating cooperatives more directly associated with promoting orderly marketing. The outstanding and ever-present problem in every milk market is surplus milk. Demand for fluid milk by urban consumers fluctuates very little from week to

week while production by dairy cows varies greatly from spring to fall. Production at the low point in the season must equal demand to avoid a market shortage. The resulting extra production at the high point for which manufacturing uses must be found if the producer is not to suffer a total loss on that production is called surplus. Operation by cooperatives of manufacturing plants is for the purpose of utilizing the surplus and preventing such loss. Obviously such utilization tends to maintain orderly marketing conditions to the benefit of all producers shipping to the market.

The Boston supply area extends over a sparsely populated area from Northern Maine to Lake Champlain, and thence to Connecticut over widely varying topography, and production is characterized by a sharp, short and high seasonal peak of spring milk production, the surplus of which is manufactured in a wide range of products including dried skim milk, cottage cheese, ice cream, condensed skim milk and butter.

With respect to the responsibility of providing manufacturing facilities for the surplus, the evidence shows an impressive record for the cooperatives. Some of them entered the manufacturing field more than 20 years ago to provide the necessary outlets for surplus milk of their members. In 1939, of 21 plants under the order equipped for manufacturing milk powder, condensed milk or butter, 13 were owned by cooperatives and 8 by proprietary handlers. Nine of the 12 milk drying machines in the milk shed are operated by cooperatives. Hood and Whiting and two others are the only proprietary handlers which maintain country manufacturing facilities.

103 Prior to the promulgation of the Agricultural Adjustment Act in 1933, some milk producers were fortunate enough to have contracts with handlers who had a high percentage of Class I sales and who paid the producers accordingly. Those producers, as the representative of one such group testified, opposed the original Order No. 4 "because we sold enough Class I milk so that our price was higher than the blended price," under the order. Naturally

all producers sought continually such outlets for their milk, and such handlers could select the producers able to supply them constantly, bought from others as needed, and avoided carrying the surplus by buying close to their requirements, and dropping producers when it was profitable to do so. The great majority of producers, however, enjoyed no such favorable sales outlets, and they bore the loss at seasons of high production.

The pooling provisions of Federal orders enable all producers in a marketing area to participate in the returns from Class I sales and require all producers to share equally in carrying the burden of the surplus. Those provisions followed the blend-price system adopted by cooperatives for equalizing returns to their own members, merely extending that system to cover all producers.

Under this type of pooling of the market supply of milk, competition among handlers to increase the proportion of their fluid sales as a means of improving their competitive position among producers is largely eliminated, and both

cooperative and proprietary handlers testified that
104. the equalization system requires that handlers who control the supply assume responsibility for shipping the milk to the market as needed for fluid consumption and for providing manufacturing facilities for the surplus.

The experience of handlers in the Boston market has indicated that in spite of continuous efforts to perfect price and price differential relationships under the order there always has been present in the market some degree of effort among handlers to avoid responsibility for utilization of the surplus or supplying milk according to varying needs of handlers. The cooperative witnesses contended that in the game of trying to avoid such responsibility the cooperatives are vulnerable because of the non-profit and service nature of their operations and that they usually find that the burden of handling surplus and the responsibility of shipping as supplies are needed has been passed on to them. The hearing record supports this contention by concrete evidence of extremely irregular demands upon cooperatives for fluid milk supplies by city milk distributors and of the

handling by cooperatives of a relatively large proportion of all surplus² in the market. Testimony showed that 5 or 6 times as many distributors called upon the cooperatives when they have the least surplus milk to sell as call upon them when they have the most to sell. This is demonstrated by evidence that purchases of milk for Class I use from all the cooperative plants in the market varied from an index of 152 in November 1939 to 60 for June 1940 (annual 105 average equals 100). Only 28 distributors purchased milk from cooperatives regularly in all months of the year (1939), while 257 called upon them for milk in not more than one month. The volume of such sales in November was 113 percent higher than in June. In 1939, the operating cooperatives handled 43.5 percent of all the milk in the Boston market but had 60.2 percent of the surplus. A comprehensive analysis of selling operations of operating cooperatives which the Government introduced as an exhibit during the hearing verified and amplified the testimony of cooperative representatives on this point.

It may be noted here that the service rendered by the bargaining cooperatives in shifting producers among handlers to meet seasonal demands and the service rendered by operating cooperatives in meeting such demand serve an identical purpose and both tend to promote orderly marketing of milk.

The cost of maintaining facilities to handle surplus milk is high. The record shows that in 1939 for the cooperatives which together operate 44 plants of all types, members have an aggregate investment of \$1,111,491 for manufacturing purposes. The annual cost of maintaining that capital investment, exclusive of current operating expenses such as labor, power and supplies, was estimated at \$246,992, which equals 5 cents per cwt. of the total member milk handled by these cooperatives.

The seasonal nature of production and the resulting idleness of manufacturing equipment during the season of low production is largely responsible for the high cost of maintaining facilities. The opponents of cooperative pay-
106 — ments testified that proprietary handlers which

operated manufacturing plants were subject to similar periods of idleness of facilities. H. P. Hood and Sons, Inc., for example, testified that some of their manufacturing facilities stood idle 40 percent of the time. However, some facilities of cooperatives stand idle as much as 85 percent of the time. This difference is due to the irregular demands of proprietary handlers for Class I milk from cooperatives and results in their costs being extraordinarily high. This is demonstrated by evidence showing that the cost of handling surplus milk varies considerably between proprietary and cooperative handlers. The representative of Hood testified that the cost of handling milk at their plant in Newpoft, Vermont, was 11.6 cents per cwt. and a representative of New England Dairies testified that their average cost was 28.8 cents per cwt. for all plants with manufacturing operations. The record contains a large amount of detailed information regarding plant investment, equipment, costs and services rendered, all of which were considered carefully in connection with the proposed amendments to Order No. 47.

The evidence showed that proprietary handlers in the Boston area, even those that own and operate their own country plants, were primarily engaged in supplying their own Class I needs for profit and are not normally interested in maintaining a reserve supply of milk for other and competing handlers. The witnesses of Whiting Milk Company testified that there were no handlers in the market who relied upon it for milk in times of short supply. The witness of Hood testified that one proprietary distributor does not like to buy milk from another proprietary distributor because he does not wish his customers to know that his supply came from a competitor, and prefers to buy from cooperatives with which he does not compete in distributing milk. The cooperatives are undoubtedly the logical type of handler to perform such services. As noted above, evidence showed that there is concentration of a large proportion of the surplus milk in the plants of cooperatives and dependence by proprietary

distributors upon the cooperatives for milk to supplement their own supply in period of short production:

The attitude of the cooperative leaders during the hearings was that while the cooperatives were entirely willing to accept the burden of handling the surplus, they cannot afford to pay the total cost.

However, in determining the rate of payments to operating cooperatives rendering services to all; the Secretary did not find that evidence supported the cooperative proposal of 5 cents per cwt. on all milk handled by such cooperatives. For instance, it was shown that one large operating cooperative distributed milk direct to consumers under its own brand name in competition with proprietaries. It would have given that cooperative an unfair competitive advantage to allow it 5 cents on all milk handled. While the evidence as a whole indicates that operating cooperatives do maintain a reserve supply for the market at a cost not recoverable in the normal channels of business, it further disclosed that there is a wide variation among individual cooperatives in their ability or willingness to provide that type of service for the market. One cooperative
108 has its own retail outlets, another primarily supplies milk to stores, others are closely affiliated with single handlers, while others are primarily engaged in the type of service for which compensation from the pool was sought. Therefore, it was deemed important to be sure that the amount of payment allowed did not exceed the cost of the service rendered to the market by the cooperative. Accordingly, the 5-cent rate was restricted to Class I milk sold by the operating cooperatives to proprietary handlers excluding milk sold to stores or distributors in which the cooperative has any degree of ownership, or to handlers with whom the cooperative has arrangements rendering its milk not sold to such handlers available for sale as Class I milk to other handlers. This resulted in the 5-cent rate being applicable to only about 31 percent of the milk handled by operating cooperatives or payments substantially less than proposed by such cooperatives. (Total payments to

operating cooperatives average about 3 cents per cwt. of their milk compared to the 5-cent rate requested.)

Extensive questioning of witnesses on the record, and analysis of the resulting testimony together with various exhibits revealed that relatively high costs of cooperatively owned plants was due in part to over-capitalization and excess capacity, both of which existed, incidentally, prior to the beginning of Federal regulation. That fact, in the Secretary's opinion, indicated a need for keeping the rate of payment comparatively low to guard against the payments becoming a subsidy for inefficient management.

Certain proprietary witnesses urged that the cost of handling the surplus and maintaining the reserve supply 109 ~~be~~ borne, not by producers generally but by the proprietaries who benefited from it particularly. This objection was considered in the light of the normal place of the service in the structure of this market. Cooperatives established supply depots in the market and arrangements for servicing milk distributors of all types before the order, to assure member producers of the best possible market by making supplies of milk for the higher valued fluid use easily available to all distributors large and small. Under the Order No. 4 pool, however, the benefits of that activity were automatically shared by all producers. Therefore, it appeared equitable to prorate the cost of such service among all producers rather than assess it entirely against the particular distributors being served. Such passing on of the cost would tend to raise the total cost of milk to such handlers to the point of placing them at a competitive disadvantage to the large handlers with attendant possible disadvantage to producers of a less freely available supply of milk in the city for the higher-valued fluid use. This would tend to concentrate control of the market's supplies among the larger proprietary handlers. A logical result would be that ultimately the handler customers of the cooperatives would be driven into the country to establish their own receiving plants, thereby adding to the existing excess plant capacity, or would try to buy from other pro-

proprietary handlers. Either result would tend to draw producers away from the cooperatives and injure the cooperative movement contrary to the expressed intent of Congress to encourage milk cooperatives.

110 In connection with this aspect of the problem the Secretary had to consider testimony of representatives of a group of the smaller proprietary milk distributors in Boston who proposed a pooling of allowances for cost of operating country receiving plants and for transportation which for small concerns would be far in excess of allowances for larger operators. These distributors maintained that such special consideration was necessary to prevent them from being forced out of business by competition of large distributors and the resulting monopolization of milk marketing in Boston by such large handlers. The allowances which these distributors requested all producers to bear would have reduced the average value of milk substantially more than the amounts deducted for cooperative payments. The proposal was not adopted as it appeared that it would lessen any incentive to improve efficiency of plant operations which, in the long run, would be disadvantageous to producers, distributors, and the general public.

However, the representations of these small distributors indicate that there has been some threat of monopoly in this market. This supports the conclusion that the service of cooperatives in making milk supplies freely available in the market for all types of distributors retards and tends to prevent further concentration of control of supplies among the largest distributors. While the Secretary did not find justification for allowing directly to any particular distributor an allowance greater than the average because of the small size of his business, the 5-cent payment granted to cooperatives for selling Class I milk to these distributors helps solve the problem of such distributors and

111 thereby helps avoid the danger of monopoly which they insist will result if their problem is not solved.

With reference to the rates of payment which should be allowed to both types of cooperatives, there is evidence that a significant element of their cost is for organizational maintenance. Cooperative associations depend for their

success on a large amount of promotional and educational work to show farmers the advantages and benefits to be obtained from cooperation, and a continuous program of personal work among members to insure they exercise sound judgment in the management of the cooperative. This is necessary to prevent what is inherently a completely non-profit democratic business organization from becoming merely a vehicle for uncontrolled professional management. The cost of such organizational maintenance varies with the amount of the capital assets required for the particular enterprise. The task, therefore, is greater for operating cooperatives than for those which are merely bargaining cooperatives. The record shows that the former type has a large investment in physical plant facilities for handling and processing milk which the latter type does not maintain, and that situation indicated a need for a higher rate of payment to the cooperatives which operate their own plants.

The payment plan adopted allowed bargaining cooperatives only 75 percent and operating cooperatives only

112 60 percent of the rates proposed with part of the latter's payment dependent upon the quantities of milk marketed for fluid consumption. In view of the evidence which indicates that activities of the cooperatives are roughly of two categories—those which are primarily of benefit to members only and those which benefit all producers alike—the payment plan was designed to allow cooperatives only a moderate proportion of their total costs. The cost of the services for which payments are allowed is impossible of exact measurement, but it is believed by the Secretary of Agriculture and his advisors that their value to all producers in the marketing area greatly exceeds the amount required by the order to be deducted from the value of all milk in the pool (1.48 cents per cwt. of milk).

Incidentally, the 5-cent payment did not result in a net increase in income to cooperatives in view of other amendments to Order No. 4 made at the same time reducing the basic handling allowance on Class II milk to all handlers, proprietary and cooperative, from 26 cents to 21½ cents per cwt. The order, prior to the August 1, 1941, amendments had reflected in the Class II price, an allowance of 26 cents

per cwt. to defray the cost of handling surplus milk. A major issue during the hearings was the correctness of this allowance. Testimony was received intended to justify an increase in that allowance and other testimony was received intended to justify a decrease. The eight cooperatives which sponsored the proposed pool payments to cooperatives also proposed a reduction of 3 cents per cwt. in the Class II handling allowance—from 26 cents to 23 cents per cwt. The evidence on that issue was conflicting but it showed that costs vary considerably among plants, and that in terms of the existing system of a single rate to all plants, it was inconclusive as to making an independent
 113 change either up or down. However, because of the relatively high costs shown for cooperative plants which serviced the irregular demands for Class I milk by distributors, the single rate then being allowed for all plants appeared inequitable. Therefore, a lower uniform handling rate, together with a pool payment to compensate for the extraordinary high costs of operating cooperatives for servicing the market, appeared fair.

Accordingly, in connection with the 5 cents per cwt. allowance to operating cooperatives on certain sales of Class I milk, the same amendment provided a reduction of the uniform allowance for handling Class II milk of $4\frac{1}{2}$ cents per cwt. to be distributed among the producers. That change alone, on the basis of the 520,000,000 pounds of Class II milk handled under the order in 1942 increased returns to producers by \$234,000, and more than offset, so far as the producer was concerned, the \$175,236 reserved to cover payments to all qualified cooperatives for that year; and while the record in this case does not show it, similar results obtained for the succeeding years, according to the records of the Market Administrator's office which have been examined also by the plaintiff's representatives.

Principal opposition to the cooperative payments amendment to Order No. 4 came from Hood and Whiting, the two leading proprietaries, although those payments have no effect on the price which the proprietaries are required by the Order to pay for milk, which is based on its use value to them. Whiting's representatives testified concern-

114 ing its plants and cost of operation and states that that company was equipped to furnish the same type of service as operating cooperatives, and that it was "opposed to such deductions, since such allowances will reduce returns to producers. If, however, such allowances are approved by the Secretary any amendment should provide for similar allowances to all handlers under the order, so that there will be no discrimination between handlers." A representative of Hood cross-examined various witnesses during the public hearings at will.

The proprietaries, although not denying that some of the cooperatives rendered service in supplying milk to proprietaries irregularly, and that such service in some cases was rendered at very high costs compared to costs of proprietaries, maintained that such cooperatives should compensate themselves by charging the excess cost to the particular handlers who received benefit from the service. The consideration which the Secretary gave to this contention has already been noted.

They contended, also, that if the services which bargaining cooperatives rendered in connection with sponsoring legislation and milk orders and collecting and presenting information during public hearings was worth anything at all, it was worth enough that cooperative members should be willing to pay the total cost.

A number of producers also testified in opposition to the proposed amendments, some in behalf of themselves, others in behalf of groups of producers ranging in number from 37 to 100, representing in all approximately 400 non-members, out of nearly 15,000 producers shipping to the Boston area, and most of those so appearing or so represented shipped to Hood or Whiting. One of these
115 witnesses was the plaintiff, Stark. In addition, other witnesses opposed the amendments on behalf of several small handlers and a small cooperative. Those witnesses based their opposition on various unsubstantial grounds, including the unsupported claim that by the payments producers would lose 3 cents per cwt. on their milk, and testified that they did not want to pay "dues" for anything; that cooperatives rendered no service; "again another year

the cooperatives would ask for 7 cents or 8 cents allowance and that would break down the order; that cooperative payments are un-American, Russian and socialistic; that payments would decrease price to independent producers, would break down the order, would damage the big producer; that the 5 cents would be a subsidy to operating cooperatives. One group of 60 opposed the payments for the same reason they opposed the original order, that is, that they enjoyed a preferred position in the market by selling to Whiting for Class I use; and other witnesses merely opposed the payments without stating any reasons.

The foregoing indicates that the Secretary had before him a large amount of evidence relative to the proposal that cooperative associations representing producers whose prices and other terms and conditions of payment for their milk are determined by Order No. 4, as amended, be indemnified from the marketwide equalization pool for services rendered which benefit all producers. The weighing
116 of this evidence amply demonstrated that the alleged type of services were being rendered; that they did result in benefits to non-member producers; that they constituted an integral part of the structure of this market, the basic characteristic of which is marketwide equalization among producers of the value of all milk; that such services were distinguishable from other activities of cooperatives which affect members only; and that rates of payment prescribed were commensurate with the cost of the services for which payment was sought. The Secretary's order represented a careful appraisal not only of the voluminous testimony of proponents, but also of much evidence in opposition to the payment plan, which resulted in a revision downward of the rates of payment proposed by the proponents of the amendment in recognition of several objections which appeared valid.

CHESTER W. SMITH.

Subscribed and sworn to before me this 26th day of May, 1945.

[SEAL.]

L. M. SAMPSON,
Notary Public.

My commission expires July 31, 1947.

117 Filed Oct. 2, 1946, Charles E. Stewart, Clerk.

**AFFIDAVIT OF THOMAS G. STITTS IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

THOMAS G. STITTS, being duly sworn, deposes and says:

I am now and since May 1942 have been Chief of the Dairy and Poultry Branch of the Office of Marketing Services of the War Food Administration. Prior to that date I was Chief of the Cooperative Research and Service Division of the Farm Credit Administration, and I had been with that Division since 1928. Prior to 1928 I was for some years a member of the faculty of the University of Minnesota, teaching agricultural economics, and I possess the degrees of B. S. in agriculture and Ph. D. in agricultural economics. The Cooperative Research and Service Division had broad statutory authority to study and perform services for farmers' cooperative organizations and made a variety of studies of the dairy industry and the relation of cooperatives to it. I was in charge of that work, and it brought me into more or less direct contact with all the farmers' cooperatives of any size in the country handling dairy products and fluid milk, and under my direction that Division published a long series of bulletins dealing with practically all aspects of dairy cooperative

118 activities. That Division, also, acted in an advisory capacity to the Banks for Cooperatives in connection with loans affecting dairy cooperatives, all of which involved detailed examination of costs of plant operations and all types of services rendered by dairy cooperatives. As Chief of the Dairy and Poultry Branch, my duties have included administration of the milk orders provisions of the Agricultural Marketing Agreement Act of 1937, and have involved continuous study of the problems of producer-owned and producer-controlled milk cooperatives, including those serving the Boston marketing area, in connection with the pricing of milk to producers.

Federal milk price orders came into being as the result of the promulgation by Congress of the Agricultural Ad-

justment Act in 1933 (which, later was amended, in 1935, and reenacted and amended in 1937 under the name Agricultural Marketing Agreement Act of 1937), a time when farmers already had been suffering from depression in prices beginning in 1922 as the result of World War I. Cooperatives in the Boston area took an important part in sponsoring that legislation and subsequent amendments affecting milk marketing. They proposed the order regulating the handling of milk in the Boston marketing area, which was the second milk order issued, and during the twelve public hearings on proposals for that order and amendments thereto which have taken place since February 1936, those cooperatives have performed the major part of the groundwork necessary to promulgation of such regulations by the Secretary of Agriculture. Such services rendered by cooperatives have led the Secretary to be extremely reluctant to consider requests for Federal orders in markets where a well-organized cooperative does not exist, particularly because producers have to assume responsibility for approval of orders, and cooperatives promote understanding of the problems involved.

The Act contemplates regulations by the Secretary based on evidence offered in public hearings. The average milk producer does not have detailed knowledge of the complexities of the milk price structure and does not have time to familiarize himself with those problems. It is my opinion that much of the non-member objection to contributing to the cost of obtaining and presenting economic evidence and contributing to the expense of maintaining operating plants arises from the lack of understanding of what is involved and of the fact that such work is required to be done by producers themselves. The Dairy and Poultry Branch contributes impartial pertinent economic data during public hearings, but in order to furnish all of the information necessary to the promulgation of an order or amendment, as plaintiff Stark appears to suggest in his affidavit that the Government should do, the Division would need a greatly increased staff of specialists and

fieldmen to duplicate the work now done by cooperatives and public hearings under such circumstances would bear slight resemblance to the democratic process prescribed by Congress. Furthermore, such procedure would have an adverse effect on the cooperative movement contrary to the policy of Congress expressed in numerous agricultural statutes, a policy which was expressly reiterated by amendment to the original act, which required that—

“ . . . The Secretary, in the administration of this chapter, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.” (7 U. S. C. 610 (b)(1))

120 The nature of milk production is such that at all times of year there needs to be some surplus milk over the quantity required to supply the public demand for the milk in fluid form. Bottled milk traditionally brings the highest price, and those particular producers who were selling their milk to handlers with a high percentage of fluid milk sales were in a favorable position. They felt little urge to join a cooperative, and together with the big handlers, were the chief objectors later not only to the market-wide pooling arrangement but also to the cooperative payment provisions involved in this case. But the great majority of producers had no assurance of such a favorable Class I market. Their milk was delivered to handlers' plants where it was dumped into tanks and lost its identity. From that point, it was impossible to tell which producer's milk was finally sold to consumers in fluid form. The cooperatives, to enable all their members to share in the fluid milk returns attempted to adopt an equalization pool system, that is, to pool the total returns on their milk, to divide that amount by the total quantity of milk sold by members for whatever purpose, and to pay to each of their members a resulting price commonly referred to as the “blend” price. The Boston Federal order has followed

the same pattern, and the order accomplished for all the producers in the area what the cooperative practice had accomplished for their members, that is, it enabled all producers to share in the higher returns for Class I or fluid milk and required all of them to share proportionately in the burden of the surplus. That is an over-simplified statement as there always are certain allowances for quality, location, etc.

At all times the primary purpose of the dairy cooperatives has been to obtain higher prices and steadier
121 sales outlets for milk by collective bargaining, and the avowed purpose of the Act was the enhancement and stabilization of prices to producers. The history of the Boston order shows that it has resulted in constantly improving marketing conditions and prices to producers.

The most rapid developments in the cooperative marketing of farm products resulted from the "agricultural depression" following World War I. State and Federal Governments passed legislation for their encouragement and assistance. As a result, there has been steady improvement in service standards and constant effort to improve the economic welfare of producers. Experimental agencies and scientific methods have become important features of cooperative marketing. The larger cooperatives, including those in the Boston area, have developed and maintained trained marketing specialists, economists, statisticians, fieldmen, etc., to keep their members informed concerning economic conditions in the dairy industry as they applied to the members. All States have enacted special cooperative laws. The Wisconsin statute appears to state the general attitude of Government when it recites that "the history of the farm marketing problem in the State and Nation, as well as throughout the world, points to a solution chiefly through cooperative marketing efforts of producers," pointing particularly to dairy producers.

The successful establishment of cooperatives has naturally been attended by many obstacles. Those with whom they have come in competition in securing control of the milk supply have been resourceful and active. They have

appealed to the guilelessness and cupidity of members with a view of breeding dissatisfaction on their part with the associations and inducing them to breach their contracts with the cooperatives, and in a number of instances have promoted litigation and legislation intended to defeat cooperative ends or to discourage their growth.

The hearing record on the Boston order showed that cooperatives supplying the Boston market were engaging in numerous activities highly beneficial to the farmers in the area, such as (1) promoting Federal and State legislation benefiting farmers, presentation of evidence at hearings concerning needs of producers with respect to prices for milk and differentials to reflect handling costs designed to furnish an adequate basis for constructive amendments to the order, study and research with respect to marketing problems common to all producers, educational activities for the purpose of giving producers a better understanding of the Act and price problems under the order, insurance to producers generally of a market for their milk; and (2) assumption of responsibility for a reserve of milk to meet the irregular needs of distributors, which is essential in a market which provides market-wide equalization of returns among all producers of the total value of the milk, and manufacture of surplus milk to insure producers fair return on that milk. The greatest service rendered, of course, was their assistance in achieving stabilization of the market.

The cooperatives could not restrict the benefits resulting from those activities to their own members even if they desired to do so. There is no doubt that but for the efforts of the cooperatives there would have been no Boston order, and equally there is no doubt that as the result of the order and amendments thereto prices to producers and marketing conditions have been greatly improved. In my opinion, during the period of agricultural readjustment which will follow this war, and which already is beginning, well-informed and well-organized dairy cooperatives will be practically indispensable to dairy farmers.

All of the costs of the aforesaid services until August 1,

1941, were borne in the Boston area by members of the cooperatives, and the hearing record shows that assessments for the support of such services ranged from 3 cents to 10 cents per cwt. of milk sold. In addition, special assessments were imposed frequently to pay unexpected expenses, and in some cases deductions from payments for milk in the nature of a loan were made to finance cooperative activities. With members subject to such assessments, it is not difficult to understand that such costs decidedly tended to limit the scope of cooperative activities and to discourage many farmers from joining, especially as minority groups remaining aloof enjoyed the benefit of such activities while the saving in assessments gave them a higher price for their milk. It has been suggested that if the cooperatives are deprived of the payments provided in the Boston order, they still will continue their activities. That probably is true, although the cooperative representatives during the hearing indicated that the activities would have to be restricted if members were to carry the whole cost in the future, but that does not render it either fair or progressive to compel members to pay the entire cost.

The second type of service in Boston according to the hearing record is supplied by cooperatives operating plants. The hearing record contained evidence in favor of payment of such service and in opposition to payment.

124 It was believed by the Secretary that the evidence in favor of such payments was far more substantial than that in opposition and was sufficient to justify issuance of the payment amendments. That evidence is summarized in the affidavit of Mr. Chester W. Smith herein. The record showed that such operating cooperatives maintain a reserve milk supply which enables handlers to supply the varying consumer demand at all seasons, that by manufacturing the surplus milk, the operating cooperatives provide producers with a greater financial return on their milk than they otherwise would receive, and that readily available manufacturing outlets for the surplus tend to strengthen the market for all producers' milk, help to promote the orderly and efficient distribution of milk and

support the price of Class I milk. Furthermore, while the proprietary handlers are interested in the processing margin, the cooperative handlers are interested in the returns to producers, and it is believed that the payments to the latter constitute an incentive to endeavor to sell a larger percentage of their milk for Class I use and thereby increase the Class I price enough to offset the payment.

It is true that a proprietary handler could organize his business in such way as to obviate the need for this type of service to some extent, although that would be unnatural in a business in which inter-handler competition for sales volume is so intense. There is an inescapable responsibility of producers, however, if they are to sell their milk to the best advantage, to competing handlers, to make that milk easily available to city distributors for use as fluid milk which returns the highest prices. The farmers benefit from

125 having plant facilities to supplement the proprietary plant systems to the extent necessary to make their milk readily available. Furthermore, the assumption of that responsibility entails maintenance of an extensive, managerial establishment in order to make certain as an association of members' patronage and to keep members in touch with such operations.

Furthermore, smaller competing handlers do not want to depend upon the larger handlers for their entire supply. Proprietary handlers have not consistently performed such service in the past, and there is no evidence in the hearing records of any of the Federal milk orders which contain cooperative payment provisions that they intend to perform it in the future. The Boston record contains testimony of a representative of one of the two largest handlers that it does not supply other handlers and such handlers do not call upon it for supplies.

On the basis of testimony in the hearing record and my personal study of and experience with dairy cooperatives, which includes close consideration of similar provisions for cooperative payments in the New York and Cincinnati orders, it appears that the services rendered to the market as a whole are beneficial to all producers in the area, that

sharing of the costs of such services is fair and equitable, and that such costs are a distinct and proper economic factor in the pricing of milk in the marketing area, and, therefore, incidental to the other provisions of the act and order.

The hearings on the amendments to the Boston order which became effective on August 1, 1941, were unusually protracted. At all hearings all interested parties, 126 whether cooperatives, non-members, handlers or consumers' representatives are free to appear and offer evidence, and to question others who testify on all points pertinent to the purposes of the hearing, and the record shows that the Boston order hearings followed that pattern. The order did not become effective until after referendum of all producers resulting in approval of two-thirds of the producers, either by number or volume of milk, and the affidavit of Mr. Aplin shows such approval of the Boston order as amended. It has been suggested in connection with this case, that producers should be allowed to vote on each amendment separately, and that if that were done, some who favored the amendments might have voted adversely on the cooperative payment provisions. In connection with closely-related provisions of an order directly affecting prices for milk, such separation is not feasible for the reason that if one provision were voted down, the remaining factors would require readjustment. That situation existed in connection with the amendments here because of the close inter-relationship between the cooperative payments and the Class II milk handling charge also provided by the same amendments. The final price naturally is the main interest of the producers as voters.

The Boston order, as amended, like all such orders and amendments, is subject to further amendment at any time. Since August 1, 1941, there have been a few minor changes made in the cooperative payment provisions. At one time a major change was proposed by one cooperative; on another occasion a small cooperative, unable to qualify for payments, requested that those provisions be deleted; and whenever the subject has arisen, the two larger

handlers have urged that cooperative payments be
 127 stricken from the order. There has been no showing,
 however, sufficient to justify elimination of the pay-
 ments. The handlers apparently fear that payments to op-
 erating cooperatives will give the latter a competitive ad-
 vantage over the big handlers. It is true, however, as shown
 by the hearing record, that extraordinarily high costs are
 inherent in operating the service plants of cooperatives.
 That being so, to allow the operating cooperatives part of
 those costs out of the pool gives the cooperatives no ap-
 preciable advantage over proprietary handlers.

It having been determined that cooperative payments
 were justified, it became necessary for the Secretary to
 incorporate in the order a set of standards of eligibility
 for payments, and to do that he had to look for guidance
 to expressions of Congress in various agricultural statutes.
 One of the principal sources was the Capper-Volstead Act
 of 1922. That statute requires that cooperatives must be
 operated for mutual benefit of members, that no members
 may have more than one vote, that the cooperative asso-
 ciation shall not pay dividends on stock or membership
 capital in excess of 8 percent, and that the cooperative shall
 not deal in non-member products greater in value than the
 membership products. A number of Federal statutes
 promulgated prior to that time had exempted agricultural
 cooperatives from their provisions, notably tax statutes,
 or provided for their financial assistance, for example, the
 Federal Reserve Act of 1913 and the War Finance Corpo-
 ration Act of 1918. Promotion of the cooperative move-
 ment has been an important duty of the Secretaries of
 Agriculture since 1913 when the Office of Markets was
 created in the Department of Agriculture with a project
 established with reference to "cooperative purchas-
 128 ing and marketing," for engaging in research and
 other work relative to agricultural cooperation,
 which was continued by it and its successors until the enact-
 ment of the Cooperative Marketing Act in 1926 the pur-
 poses of which were "to create a division of cooperative
 marketing in the Department of Agriculture; to provide

for the acquisition and dissemination of information pertaining to cooperation; to promote the knowledge of cooperative principles and practices; to provide for calling advisers to counsel with the Secretary of Agriculture on cooperative activities; to authorize cooperative associations to acquire, interpret, and disseminate crop and market information, and for other purposes." It was not until 1929, however, when the Agricultural Marketing Act was passed in which Congress authorized the creation of the Federal Farm Board and authorized that Board to make loans to cooperative associations of farmers, that the policy of Congress was fully stated. That Act set forth that—

"it is hereby declared to be the policy of Congress to promote the effective merchandising of agricultural commodities in interstate and foreign commerce, so that the industry of agriculture will be placed on a basis of economic equality with other industries, and to that end to protect, control, and stabilize the currents of interstate and foreign commerce in the marketing of agricultural commodities and their food products

(3) by encouraging the organization of producers into effective associations or corporations under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled cooperative associations and other agencies,"

That Act also authorized the Board to encourage "the organization, improvement in methods, and development of effective cooperative associations." In the Farm Credit Act of 1933, Congress defined the term "cooperative association" as meaning "any association in which farmers act together in processing, preparing for market, handling, and/or marketing the farm products of persons so engaged, and also means any association in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm business services; *Provided, however, That* such associations are operated for the mutual benefit of the

members thereof as such producers or purchasers and conform to one or both of the following requirements," those requirements being the ones set forth in the Capper-Volstead Act. The Agricultural Adjustment Act of 1933 did not contain any statement of policy of Congress toward cooperatives, but in 1935 that policy was incorporated by amendment to the act, as quoted on page 3 of this affidavit, and was adopted when the act was reenacted and amended in 1937. There have been other statutes providing special consideration for agricultural cooperatives, but those have been the statutes which offered principal guidance for the Secretary of Agriculture in connection with dairy and other cooperative associations.

The Secretary also had to consider the State laws in connection with the organization of cooperatives. The laws of the various States differ, but they all set up certain fundamental requirements in harmony with the Capper-Volstead Act, although that act establishes more rigid requirements for producer-ownership and control than the State laws generally. The Secretary in connection with milk orders has adopted whichever law was the more stringent. That was particularly necessary with respect to cooperative payment provisions in the milk orders in order to prevent participation in the pool by cooperatives ostensibly producer-owned and controlled but actually controlled by handlers.

130 The hearing record in connection with the August 1, 1941, amendments to the Boston order shows a variety of types of cooperatives in the Boston area, and to meet the standards offered by the various agricultural statutes, the proposals of the cooperatives were modified considerably in the light of the evidence offered. In addition to the requirement of complete producer-member control, guarantee of payment for milk to producers, and a program for checking weights and tests of member milk, applicable to bargaining cooperatives only, proposed by the cooperatives, the Secretary required proper organization under State law; conformity with the Capper-Volstead Act as to character of organization, voting requirements,

dividend payments, and dealings with non-members; maintenance of a competent staff for dealing with marketing problems and providing information to members; maintenance of close working relationships with members; and collaboration with other associations in the maintenance and strengthening of collective bargaining by producers, and the operation of a plan of uniform pricing of milk to handlers. In connection with qualifications for payments to operating cooperatives, certain additional requirements of precise performance by the cooperatives were imposed to enable them to qualify for the 5-cent rate of payment.

The amendments required further that the cooperatives should make reports to the Market Administrator concerning the payments and that their books and records should be open to audit by the Department of Agriculture. It was provided, also, that eligibility to receive payments may be cancelled whenever the Secretary determines upon the basis of such reports and audit that cooperatives are not complying fully with the requirements of the order.

The rates of payment provided in any order, particularly the rate to the operating cooperatives, are to some extent experimental, and are subject to revision if it appears proper in the light of more definite information as time goes on concerning cost of the services rendered. The operating cooperative payment under the New York order has been revised downward.

At the time the cooperative payments became effective under the Boston order, there were 19 cooperatives performing functions deemed necessary to qualify them for such payments and bearing all the costs of the services deemed by the Secretary to be for the benefit of the market as a whole. Nevertheless, careful investigation of the methods of those cooperatives was made, and it was not until November 27, 1941, that the first determinations of eligibility were issued, and were made retroactive to August 1, 1941. Ten were qualified at that time; four were disqualified, two of which later qualified; and others qualified at later dates, the delay being due to the fact that certain elements in the

stock ownership had gotten out of hand, and the Secretary insisted that although they qualified on other points, they had to call in the stock held by inactive patrons, before they could collect payments. Of the ten then qualified, all of them received the 11½-cent payment and five received the 5-cent payment. At present, 19 cooperatives have qualified to receive payments from the Boston pool. During the interim two cooperatives have been suspended on the basis of information received by the Secretary, and 132 later were reinstated after correcting their practices to bring them in harmony with the requirements of the order. The number of cooperatives that finally qualified was the number anticipated by officials of the Department of Agriculture when the amendments were issued.

The amount of money paid out of the pool each month has been approximately as anticipated at the time of the amendments, the estimate then being \$15,575.31. Records maintained in the office of the Market Administrator in Boston (which have been examined by representatives of plaintiffs) and his monthly reports to me show that the monthly deductions from August 1, 1941, through April 1942 were less than the estimated amount; that the average monthly deductions for 1942 were \$14,793.63; for 1943 were \$16,388.45; and for 1944 were \$17,422.01. The increase over the estimated amount in 1943 and 1944 was due, however, to unprecedented production resulting from the efforts of the farmers to meet war demands and not to unforeseen increase in the number of cooperatives certified by the Secretary nor to increase in the rates of payment, fear of both of which was expressed by plaintiffs and other opponents of the amendments. In terms of dollars the payments from the pool have been substantial; in terms of per-hundredweight of milk, they have been small; and the decrease in price to the producers resulting from the pool deductions has been 4 of 1 percent. As pointed out in Mr. Smith's affidavit, this reduction has been more than set off by the reduction in the handling allowance on Class II milk of 4½ cents per cwt. for all handlers. The two amendments were considered together and depended upon each other.

The facts herein stated are based upon my personal knowledge and evidence contained in the record of the public hearings with respect to the August 1, 1941, amendments to Order No. 4, Regulating the Handling of Milk in the Greater Boston Marketing Area, and the opinions herein expressed, are based on my considered judgment exercised in the light of my knowledge, training and experience in dealing with milk marketing problems. This affidavit is made in support of defendants' motion for summary judgment in this case.

THOMAS G. STITTS.

Subscribed and sworn to before me this 13th day of June 1945.

[SEAL.]

L. M. SAMPSON,
Notary Public.

My commission expires July 31, 1947.

134 Filed Oct. 2, 1946, Charles E. Stewart, Clerk.

**AFFIDAVIT OF RICHARD D. APLIN IN SUPPORT OF MOTION OF
DEFENDANTS FOR SUMMARY JUDGMENT**

RICHARD D. APLIN, being duly sworn, deposes and says:

That he is Acting Market Administrator under Order No. 4, Order, as amended, Regulating the Handling of Milk in the Greater Boston, Massachusetts, Marketing Area.

That the Secretary of Agriculture issued an order directing that a referendum be conducted pursuant to Section 8c(19) of the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. 608c(19)), among producers supplying milk to the Greater Boston Marketing Area in which the Secretary designated him as Referendum Agent and issued detailed instructions concerning the conduct of the referendum.

That on July 11, 1941, he mailed ballots, each accompanied by a letter of instruction for casting ballot, a copy of the tentatively approved Order No. 4 as amended, and a return stamped envelope, to 4,802 individual producers and to 21 cooperative associations having a combined mem-

bership of 10,801 producers, said cooperative associations, under Section 8c(12) of said Act (7 U. S. C. 608c(12)), being authorized to express the approval or disapproval of 135 their memberships. Producers who delivered milk to said market during January, 1941, were eligible to vote, and names of such producers were obtained from records of the Market Administrator's office in Boston. Ballots, to be counted, were required to be received by the Referendum Agent or to be postmarked not later than midnight, July 16, 1941. Any producer, not a member of a cooperative, who did not receive his ballot through the mail and who alleged that he shipped milk to the market during January, 1941, could obtain a ballot from his county agricultural agent.

The referendum results were as follows:

	Number of Producers		
	Ballots cast by Cooperative Associations	Ballots cast by Individual Producers	Total
In favor of issuance of Order No. 4 as amended.....	10,744	694	11,438
Not in favor.....	0	61	61
Disqualified ballots.....	0	88	88
All ballots cast.....	10,744	843	11,587

The reasons for disqualification of the 88 ballots were—		
Envelopes postmarked after midnight July 16, 1941.....	77	
No signature.....	2	
No vote indicated.....	6	
Unidentified producers.....	3	

Plaintiffs in this case, all of whom voted against the order as amended except one, who did not vote, in 1941 were shipping their milk either to H. P. Hood & Sons, Inc., or to Whiting Milk Company, companies which purchase their milk supplies from both members and non-members of cooperatives. The referendum, with reference to non-members shipping to those companies resulted as follows:

Company	Ballots sent to non-members	Ballots cast	Ballots in favor	Ballots not in favor	Ballots disqual- ified
Whiting.....	653	126	87	20	19
Hood.....	1,513	267	226	22	19

Of the 61 producers, therefore, who expressed opposition to the proposed Order No. 4 as amended, 42 were shipping to these two companies. The remaining 19 producers opposed were divided among the other 87 handlers in the marketing area.

The highest number of ballots cast in any previous referendum conducted among milk producers supplying the Boston area since the enactment of Section 8c(19) of the Act was 11,493.

That this affidavit is made in support of defendant's motion for summary judgment.

RICHARD D. AFLIN.

Subscribed and sworn to before me this 3rd day of April, 1945.

[SEAL]

EDWARD CARTON PATCH,
Notary Public.

138 Filed Oct. 19, 1946. Charles E. Stewart, Clerk.

REQUEST FOR ADMISSION OF FACTS

139 7. Since the effective date of Order No. 4 regulat-
ing the handling of milk in the Greater Boston
140 Marketing Area and during its continuance as from
time to time amended down to and including the
present date there has been no provision of said Order or
any amendment thereto or of any other Federal regulation,
fixing or regulating the maximum price which cooperative
associations might charge for milk sold by them to other
handlers or the maximum prices which might be charged
by such associations for services rendered in connection
with such sales.

141

EDWARD B. HANIFY,
50 Federal Street,
Boston 10, Massachusetts,
EDGAR J. GOODRICH,
Investment Building,
Washington, D. C.
Attorneys for the Plaintiffs.

142 Filed Nov. 1, 1946. Charles E. Stewart, Clerk.

ANSWER TO REQUEST FOR ADMISSION OF FACTS

145 (4) Answering paragraph 7 of the Request, defendant admits the truth of the facts alleged therein, but points out that the function of Order No. 4 is to provide minimum prices to be paid by handlers to producers and not prices to be paid by one handler to another handler.

151

N.-E. DODD,
*Acting Secretary of Agriculture
of the United States.*

Subscribed and sworn to before me this 1st day of November, 1946.

[SEAL.]

JOSEPH HALEY, *Notary Public.*

My commission expires March 31, 1947.

152 Filed Nov. 4, 1946. Charles E. Stewart, Clerk.

MOTION BY DEFENDANT, DAIRYMEN'S LEAGUE COOPERATIVE ASSOCIATION, INC. FOR A SUMMARY JUDGMENT

Dairymen's League Cooperative Association, Inc., intervenor-defendant, hereby adopts and joins in the motion filed by defendant, Clinton P. Anderson, Secretary of Agriculture, on or about October 2nd, 1946, for a summary judgment in the above entitled action; hereby adopts the grounds set forth in said motion of defendant Anderson, the points and authorities and affidavits filed therewith and files herewith additional points and authorities.

McKENNEY, FLANNERY & CRAIGHILL,
By G. B. CRAIGHILL,

Hibbs Building,
Washington 5, D. C.,

J. BOND SMITH,

737 Woodward Building,

Washington 5, D. C.,

*Attorneys for Defendant, Dairymen's
League Co-operative Association, Inc.*

SEWARD C. MILLER,

Of Counsel,

11 West 42nd Street,

New York 18, N. Y.

153 I hereby certify that on November 4th, 1946, I served copies of the foregoing motion, points and authorities by mail, postage prepaid, addressed to the attorneys for plaintiffs and for the defendant, as follows:

Honorable Tom C. Clark, Attorney General of the United States, Department of Justice, Washington, D. C. Attention of J. Stephen Doyle, Esq., Special Assistant.

Honorable Edward M. Curran, United States Attorney, Court House, Washington, D. C.

Walter J. Brobyn, Esq. and Edgar J. Goodrich, Esq., Attorneys for Plaintiffs, Investment Building, Washington, D. C.

G. B. CRAIGHILL,

*Attorney for Defendant, Dairymen's
League Co-operative Association, Inc.*

199 Filed Nov. 13, 1946. Charles E. Stewart, Clerk.

AFFIDAVIT OF EZRA MERRILL IN OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

Ezra Merrill, being duly sworn, deposes and says:

I am employed as Government Relations Director by H. P. Hood & Sons, Inc., a handler of milk in the Greater Boston Marketing Area. I was graduated from Kalamazoo College in Michigan in 1930 and from Harvard Law School in 1933. I was employed in the office of the Director of the First Federal Milk License for Boston from the fall of 1933 until beginning my work for the Hood Company in April of 1934. My work in the Director's Office had to do with analysis of the Regulation in terms of its impact upon the industry. In 1936 and '37 I took some special study in the economics of milk marketing at Harvard. I have followed continuously the publications in the field

of milk marketing economics and I have, from time to time, attended and participated in conferences of agricultural economists of the Land Grant Colleges in New England. I am a member of the American Economic Association and also of the American Marketing Association.

In the course of my work for H. P. Hood & Sons, Inc., I prepare or supervise the preparation of analyses of Governmental Regulations from the point of view of their effect on the Company's business, as well as their effect upon the producers from whom we purchase milk and upon the industry generally and the consumers which it supplies. Except for occasions when I have been assigned briefly to other work in the Company, my work has been of this nature since my employment by the Company in 1934. My responsibility includes the preparation of proposals for amendments to the Regulations and the presentation of evidence at hearings called to consider such proposals. I have attended and taken part in most of the hearings held on proposed amendments to the present Order No. 4 and the Regulations which preceded it since the fall of 1933. I am familiar with the testimony introduced in the hearings on the basis of which the amendments to Order No. 4 here in issue were promulgated and have read the Affidavits of Thomas G. Stitts and Chester W. Smith in support of the Defendant's Motion for Summary Judgment.

The statements hereafter set forth from the Affidavits of Chester W. Smith and Thomas G. Stitts filed in support of Defendant's Motion for Summary Judgment are (1) inaccurate or incomplete in their statements of fact; and (2) contain opinions and conclusions not warranted by subsidiary facts.

Affidavit of Chester W. Smith

(1) Statement on pages 3 and 4 of Affidavit.

"To justify issuance by the Secretary of Agriculture of amendments to Order No. 4 providing payments to qualified cooperatives, there had to be sub-

stantial evidence introduced during the public hearings (1) that deduction of payments to cooperatives from the value of all milk subject to the order for the purpose of defraying the costs of specified services rendered by qualified cooperatives was incidental to and not inconsistent with other provisions of the Act governing fixing of prices of milk to producers and that such payments would tend to effectuate the other provisions of Order No. 4; (2) to identify services for which payments appropriately could be made; and (3) to measure the cost of such services. Furthermore, the Secretary had to bear in mind the requirement imposed upon him by Congress, by amendment to the Agricultural Adjustment Act in 1935, to 'accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution;' and also had to bear in mind the price policy of Congress as defined in Section 8c(18) of the Act, that is, 'the level of prices shall be such level as will reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk . . . in the marketing area.'

This statement of the standards of evidence required to justify cooperative payments has no basis in the Act or in any regulation of the Department of Agriculture. It is a rationalization, after the fact, of what has been done, rather than a statement of standards currently applied at the time the contested provisions were first inserted in the Boston Order.

In an Affidavit of November 1941, in support of a previous motion by the defendant for summary judgment in this case, one H. L. Forest, Principal Agricultural Economist of the Dairy Division of the Department of Agriculture, among other things, deposed:

"The provisions for payments to cooperative associations are needed equitably to apportion the total value of milk among producers."

This statement from the Forest Affidavit was an attempt to support the provision for these payments on the strength of the so-called "base rating provision" in Section 8c(5) B(d) of the Act. The Government's memorandum of points and authorities in support of the previous motion for summary judgment in this case made much of this rationalization. On March 18, 1944, C. W. Kitchen, Acting Director of Food Distribution, filed an official report regarding the provisions for payments to co-operative associations in Order No. 4 (Vol. 9, Fed. Register, No. 57, March 21, 1944; pages 3057-3060). In this report 202 he purported to set forth the considerations on which the provisions were based. Having stated them he said:

"From these considerations it was concluded that provision for payments to cooperative associations is considered necessary to equitably apportion the total value of milk among producers. The testimony in support of the proposal to completely eliminate this feature of the order does not show that these considerations were substantially erroneous."

The statement in the Affidavit of Chester W. Smith, quoted above, correctly abandons the base rating provision of the statute as a justification for the payments to cooperatives. The shift in position of the two Government economists, Smith and Forest, and the statement as to the considerations underlying these provisions, made by the Acting Director of Food Distribution, on March 18, 1944, demonstrate that statements of applicable legal and economic criteria in the Smith Affidavit are not reliable evidence as to the actual standards which were adopted or the statutory provisions which were in fact relied upon in the original promulgation of the contested provisions of the Boston Order.

(2) Statement on page 4.

"It appeared to myself and to all others assigned to analyze the hearing record that the evidence in support of the contention of the cooperatives that they rendered services of benefit to all producers in the market indicated that the cost of such services is an element in the pricing of milk to producers and justified payment to cooperatives at not to exceed $1\frac{1}{2}$ cents per cwt. of their milk pooled, and payment of 5 cents per cwt. to operating cooperatives on certain Class I milk sold by them."

There is a definite issue of fact as to the accuracy of this statement. It is believed that contemporaneous memoranda in the files of the Department of Agriculture and the testimony of other persons then assigned to analyze the hearing record will show that there was no such unanimous concurrence of opinion as portrayed above, and that there were considerable divergencies of view among those assigned to analyze the hearing record concerning both the economic justification for the cooperative payments and their statutory basis.

203 (3) Statement on pages 7 and 8.

"There was testimony relative to identification of services for which payments appropriately could be made which showed necessity for a high standard of performance to be eligible for the payments, lest some cooperatives be indemnified whose activities benefited members only. The record shows, particularly in the testimony of those who opposed the payment plan, that all cooperatives do not have programs of comparable magnitude and scope and that not all of them are engaged in all the aforementioned activities. The record shows a range from cooperatives which did little more than contract to find a market for members' milk to the markets' largest bargaining cooperative which is engaged in all of such activities. In recognition of this situation the Secretary of Agriculture required the cooperative approved for payments to be duly organized under the laws of a State, conform to relevant standards of the Capper-Volstead Act, to operate as a responsible producer-

controlled marketing cooperative exercising full authority in the sale of milk to its members, to systematically check weights and tests of members' milk (bargaining cooperatives only), to guarantee members payment for their milk, to maintain a competent staff for dealing with marketing problems, to provide information to members, to maintain close and constant working relations with members, and to collaborate with other cooperatives in endeavors to solve problems relating to the successful operation of the Federal order.

Cooperative costs vary greatly, but the cooperative with the most elaborate program assesses its members 3 cents per cwt. of milk sold to pay for such activities as compared with assessments as low as $1\frac{1}{2}$ cents per cwt. by other cooperatives. Obviously, some of the services enumerated and likewise some required as basis for payment benefit members of the cooperatives only, particularly checking weights and tests and guaranteeing payment of milk. Therefore, the rate of payment under the amendments to Order No. 4 was fixed at not to exceed one-half the highest cost shown or $1\frac{1}{2}$ cents per cwt. instead of the 2-cents proponents requested with the further qualification in the case of bargaining co-operatives, that the rate of payment should not exceed the rate assessed directly against members."

There is a genuine issue of fact as to the accuracy of these statements. The quoted statement itself contains only a portion of the facts. Moreover, the attempt therein made to use as interchangeable terms the *cost* of certain services and the *charge* for certain services, creates a basic misconception unless it is closely scrutinized. Thus, the statement is made:—"the rate of payment under the amendments to Order No. 4 was fixed at not to exceed one-half the *highest cost shown* or $1\frac{1}{2}$ cents per cwt." This statement is to be contrasted and related to the previous statement: "Cooperative costs vary greatly, but the cooperative with the most elaborate program assessed its members 3¢ per cwt." The concept of *assessment* of members and *costs* is thus used interchangeably and creates the impression that the payments for

alleged services to non-members were computed on some scientific approximation of their cost to the cooperative. There was in fact no scientific study in the evidence before the Secretary of the cost to cooperatives of alleged services rendered by them to non-members. Neither the Order nor any other regulation prescribes a uniform accounting system for cooperative associations. The Boston Market Milk Administrator, during the five years these provisions have been in effect, has found it impracticable to attempt to relate the payments to any specific activity, outlay or business of the cooperatives receiving them. The 1½ cent payment therefore has never had any proven relation to the cost of the alleged services rendered to non-members.

From the first sentence in the statement above quoted, read in conjunction with the last sentence therein, one might gain the impression that in promulgating the contested provisions of the Order, the Secretary had evidence before him (1) identifying the services rendered to non-members by cooperatives and (2) fixing, on the basis of the cost of these services, the 1½ cent charge against non-members for the benefit of cooperatives. The actual evidence before the Secretary contains no such basis for his action. The Smith Affidavit cannot disguise the rough and ready, "split the difference" approach to the fixing of the 1½ cent rate which was adopted. This approach appears from the following portions of the Smith Affidavit:

On pages 6 and 7 there are set forth all the conceivably beneficial functions of any and all cooperatives.

205 It is admitted however on page 8 of the Affidavit that "some of the services enumerated . . . benefit members of the cooperatives only . . ."

It is also admitted that all the cooperatives do not perform all the alleged beneficial functions. Some "did little more than contract to find a market for members milk." (Smith Affidavit, page 7.)

It is further admitted that there is a wide range in the activities of cooperatives and "cooperative costs vary greatly." (Smith Affidavit, page 8.) One cooperative

"with the most elaborate program assesses its members 3 cents per cwt. to pay for such activities." (Smith Affidavit, page 8.) *Such* activities embrace apparently activities previously described, of which some are admittedly of no benefit to non-members. Further, there is no evidence of the relationship of the 3 cent assessment to the actual cost of the over-all cooperative program involved or to that portion of it which benefits members exclusively.

Consequently it appears from the Affidavit itself that non-members are assessed 50% of the 3 cent charge paid by members of the most elaborate cooperative, and that this sum is charged non-members for the benefit of all the wide varieties of cooperatives, as a means of making an unscientific allowance for the following inherent deficiencies in the evidence in the record:

(1) the absence of any evidence as to the relation of the 3 cent charge to the service cost of the cooperative making it;

(2) the absence of any evidence as to what portion of the 3 cent charge represents the cost of that portion of the cooperative's program which benefits non-members as against that portion of its program which is beneficial to members only;

(3) the absence of any evidence as to the specific differences in the admittedly great cost range between the various cooperatives.

206 (4) Statements on pages 9, 10, 11.

The general dissertation on the problem of surplus milk under the market-wide pool provided by the Federal milk order in the Boston market contained in pages 9, 10 and 11 of the Affidavit does not set forth the following important facts necessary to comprehend the whole pertinent economic picture:

1. Many milk markets operate on a relatively stable basis without any Federal milk order.

2. Other milk markets operate under a Federal milk order but with a dealer pool, rather than a market-wide pool.

3. A far greater number of markets under Federal orders operate without provision for cooperative payments than with cooperative payments. There are twenty-nine Federal milk orders in effect in the United States listed as follows:

	Order No.
1. Boston	4
2. Chicago	41
3. Suburban Chicago	69
4. Cincinnati	65
5. Cleveland	75
6. Clinton	70
7. Columbus	74
8. Dayton-Springfield	71
9. Dubuque	72
10. Duluth-Superior	54
11. Fall River	47
12. Fort Wayne	32
13. Kansas City	13
14. La Porte	20
15. Louisville	46
16. Lowell-Lawrence	34
17. Minneapolis-St. Paul	73
18. New Orleans	42
19. New York	27
20. Omaha-Council Bluffs	35
21. Philadelphia	61
22. Quad Cities	44
23. St. Joseph County	67
24. St. Louis	3
25. Sioux City	48
26. Toledo	30
27. Tri-State	72
28. Washington, D. C.	45
29. Wichita	68

207 Provision for payments to cooperative associations is included in only four of the twenty-nine orders: Boston, Cincinnati, Dayton-Springfield, New York.

4. There is no intrinsic economic necessity for cooperative payments because a given market is under a market-wide equalization pool.

5. In Boston and other markets the function of supplying milk to retail distributors is not peculiarly a cooperative

function. It is merely one of the marketing functions that is performed in a number of milk markets, sometimes by co-operatives, sometimes by proprietary handlers. Any organization, cooperative or proprietary, would have more calls for milk when milk is short than when the market is well supplied.

6. If the organization, cooperative or proprietary, engaging in supplying other handlers with surplus milk, does not recover its costs in having a standby supply to meet irregular demands, its failure to recover its costs is due to its own lack of business acumen or efficiency. It is entirely free legally to charge a price on its sales which recoup its costs.

7. The function of supplying milk to retail distributors is an entirely voluntary one. There is nothing to require any organization, cooperative or otherwise, to engage in this function, or continue to perform it.

8. The economic services which a handler selling irregularly to retail distributors renders, inure directly to the benefit of (1) the purchasing handler in satisfying his consumers and (2) to the consuming public which may need or want the milk in question, rather than to producers who have no business relations with such handler and whose milk is not purchased by such handler.

(5) Statements on pages 11, 12, 13, 14.

"The cooperative witnesses contended that in the game of trying to avoid such responsibility the cooperatives are vulnerable because of the *non-profit* and *service* nature of their operations and that they usually find that the burden of handling surplus and the responsibility of shipping as supplies are needed has been passed on to them." (italics supplied) p. 11

"It may be noted here that the *service rendered by the bargaining cooperatives in shifting producers* among handlers to meet seasonal demands and the *service rendered by operating cooperatives in meeting such demand* serve an identical purpose and both tend to promote orderly marketing of milk." (italics supplied) p. 12

"The evidence showed that proprietary handlers in the Boston area, even those that own and operate their own country plants, were primarily engaged in supplying their own Class I needs for profit and are not normally interested in *maintaining a reserve supply of milk* for other and competing handlers." (italics supplied) p. 13

The statements above quoted present a distorted picture of the operations of cooperatives in handling so-called surplus milk. The language used, particularly the italicized portions, creates the impression that the payments to so-called operating cooperatives are designed to compensate them for part of the *cost* of a service to the market or other handlers, which they do not or can not, recover in the normal channels of trade. Note especially the statement:

"The attitude of the cooperative leaders during the hearings was that while the cooperatives were entirely willing to accept the burden of handling the surplus, *they cannot afford to pay the total cost.*" (italics supplied) p. 14

The inference is easily drawn that cooperatives handling surplus and maintaining a so-called standby supply of milk *at cost* for the benefit of the market, seek through cooperative payments only to be reimbursed for a portion of their costs. The Affidavit does not reveal to the Court the following facts, which are necessary to comprehend the whole picture:

1. Cooperatives can and do recover in the normal channels of trade, through the prices at which they sell to other handlers, any costs of any alleged service they may render in maintaining a standby supply of milk to meet the 209 so-called irregular demands of other handlers. Cooperatives in the Boston market demonstrated in 1943, 1944 and 1945 that they could and would charge prices more than adequate to cover all conceivable costs of their operations. They have regularly charged premiums on inter-handler sales.

2. The evidence before the Secretary in 1941 went no

further than to indicate that the costs of cooperatives in maintaining a so-called standby milk supply for other handlers were *not recovered*. The evidence was not to the effect that these costs were *not recoverable*. Any promise by cooperatives that they would not exact premium prices in selling to other handlers (which promise the Secretary may have deemed implicit in their evidence) was repudiated shortly after the five cent payment provision was put in the Order. The cooperatives have habitually charged prices on inter-handler sales in excess of the minimum prices fixed in the Order.

(6) Statement on page 13.

"The representative of Hood testified that the cost of handling milk at their plant in Newport, Vermont, was 11.6 cents per cwt. and a representative of New England Dairies testified that their average cost was 28.8 cents per cwt. for all plants with manufacturing operations."

The statement quoted compares the cost of handling milk at one of the largest plants of the Hood Company and all of the plants of New England Dairies. This is not a valid comparison. It is meaningless for the purpose of analysis of cooperative payments. Any such comparison to have value should be on the basis of similar plants, so that the effect of differences in operating procedure might be isolated and measured.

(7) Statement on page 14.

"While the evidence as a whole indicates that operating cooperatives do maintain a reserve supply for the market at a cost not recoverable in the normal channels of business, it further disclosed that there is a wide variation among individual cooperatives in their ability or willingness to provide that type of service for the market."

210 The italicized portion of the statement quoted is not in accordance with fact. The evidence before the Secretary was not to the effect that the cooperative costs were not recoverable in the normal channels of trade. Neither the

Federal order nor any other governmental regulation or law has prohibited or does prohibit any cooperative from charging a price sufficient to cover the cost of any special service it renders in maintaining a so-called reserve milk supply. Cooperatives receiving the five cent payment, during the period provision therefor has been in the Federal order, have extracted premiums or service charges and assessed the full cost of all services against the buyers of their milk.

(8) Statement on page 16, particularly the following statement:

"Therefore, it appeared equitable to prorate the cost of such service among all producers rather than assess it entirely against the particular distributors being served."

The statements on page 16 are essentially a rationalization for the cooperative payments dependent on false factual premises. The statement quoted above illustrates this. Particular distributors, large or small, purchasing so-called reserve milk from cooperatives are assessed the cost of the alleged sales service in the price they pay for this milk. The cooperative payments taken out of non-member producers therefore have no anti-monopolistic features. If a small dealer cannot afford to pay the premium prices the cooperative chooses to exact from him, he does not get the milk. If cooperatives were required to sell their so-called standby milk to small dealers at only a portion of their cost, recouping the deficiency of their unrecovered costs from the payments from the pool, the anti-monopoly argument for the payment of the unrecovered costs might have some vestige of logic. But even, in that case, the anti-monopoly consideration would not place the entire economic burden of the cooperative's unrecovered costs on non-member producers, rather than upon all handlers, large or small. Under actual conditions, as the cooperative payment operates, the small dealer pays the

211 cooperative the premium price for its so-called standby milk; through the vehicle of this entirely

unregulated price the cooperative may recover its alleged standby costs and make a good profit; the cooperative then receives the five cent cooperative payment out of the pool and is entirely free to use the money as a subsidy to attract the small dealer's producers from his country receiving station to the cooperative's country plant, where it may engage in highly profitable manufacturing operations. The position of the small dealer as competitor in the Boston milk market is jeopardized, rather than strengthened, by the cooperative payment. He faces subsidized competition in the country in trying to retain his milk supply. As the competition takes from him his regular producer patrons, he is faced with the destruction of his investment in his country plant facilities. Proprietary organizations are thus tempted to adopt the cooperative form of organization to get the benefit of subsidies from the pool. One very profitable proprietary organization in the New England milk shed has turned its sizeable country facilities over to a newly organized cooperative association. The same management has appeared in both the cooperative and proprietary form of doing business. While this organization has not yet been recognized as eligible for the pool payments, its presence in the market indicates that the cooperative payments out of the pool, far from encouraging the existence of producer-controlled cooperatives standing on their own feet on the basis of voluntary self help, tends to produce a transformed proprietary in the cooperative form where the fact of actual producer control may be the subject of endless controversy and litigation.

(9) Statement on page 17.

"However, the representations of these small distributors indicate that there has been some threat of monopoly in this market. This supports the conclusion that the service of cooperatives in making milk
 212 supplies freely available in the market for all types of distributors retards and tends to prevent further concentration of control of supplies among the largest distributors. While the Secretary did not find justification for allowing directly to any

particular distributor an allowance greater than the average because of the small size of his business, the 5-cent payment granted to cooperatives for selling Class I milk to these distributors helps solve the problem of such distributors and thereby helps avoid the danger of monopoly which they insist will result if their problem is not solved."

These statements and conclusions are not accurate. The alleged service of cooperatives in making milk supplies freely available in the market for all types of distributors does *not* retard any alleged concentration of supply. The five cent payment to cooperatives does *not* help solve the problem of small distributors, and avoid any alleged danger of monopoly. Small distributors have advised the Secretary by testimony at public hearings on the cooperative payments as recently as March 12 of 1946 that the cooperative payments have a strong tendency to drive them out of business. Allan R. White, a small independent distributor in Boston, testified as follows:

(Record of Hearings on amendments to Order No. 4, U.S. Department of Agriculture, Docket No. AO 14-A12, page 1834.)

"... we are virtually (*vital*ly) concerned about it (*the cooperative payment*) as we are in direct competition with it for the purchase of our product from producers, and we are handicapped at the start for the amount of money involved plus many other advantages the cooperatives have over a proprietary handler." (italicized matter supplied)

~~David H. Buttrick, a small independent distributor in Boston, testified as follows:~~

"I think we are endowed with our share of the milk of human kindness; but we are not paying these premiums out of the milk of human kindness. Neither are we paying them merely because we think producers deserve more money, and we do think so. Nor are we paying them because the business can afford it. The business cannot afford it, but even less can it afford to lose the supply. When the cooperative payments provide a minimum of 1½ cents and a maximum of 6½ cents of the money our competitors are using in this way, we

maintain that we have a direct financial and economic interest in the matter. p. 1890.

213 On the city side, we are competing with qualified cooperatives in the sale of dairy products. We are equally interested in the sources of revenue of these city competitors because our only source of revenue is operations. If they have other sources, then the competition is discriminatory and is a cost burden to us. p. 1891

Returning to the premiums being paid by cooperatives, the information available to me is that one of the qualified cooperatives with which we compete paid a dividend of 13 cents on all milk its last fiscal year and has paid over the blended price every month in 1945, by amounts ranging from 11 to 25 cents per cwt., in addition to not deducting dues..

Another of these cooperatives paid four cents dividend for the year, plus 20 cents per cwt. the last two months of 1945, and also failed to deduct any association dues. A third paid the blended price but deducted no dues. Mr. Tator's office has acknowledged the difficulty of tracing these premium payments to any one source of revenue, but the ability of these cooperative handlers to pay the premiums would certainly have been less but for the income they received from the pool as cooperative subsidies." p. 1892

"I mention this here because I do not think it is the policy of Congress or of the Secretary to drive these small milk companies out of business. I do not think that producers in the pool or the industry in this area would be benefited by having them forced out of business. They are a constructive competitive force and asset to the industry if we are to keep the industry on a free enterprise basis. I think this is of special significance here because I feel that the extent to which qualified cooperatives have taken advantage of the plight of these small dealers during recent shortages is the clearest indication we could have that the cooperative handlers are not today weighing the best interests of the market when they work their price and sales policies." p. 1893.

These recorded representations of small distributors

show clearly that there is a very genuine issue of fact as to the quoted statements from the Smith Affidavit.

(10) Statements on pages 19 and 20.

On pages 19 and 20 of the Smith Affidavit, statements are made to the general effect that reduction in the so-called basic handling allowance on Class II milk to all handlers compensated for the additional payments made to cooperatives out of the pool and "more than offset" the concomitant reduction in producer prices due to the deduction for cooperative payments.

214 These conclusions are unsound; the comparisons made are inadmissible on any logical basis; the basic facts are not completely presented.

In the first place no term of the Boston Milk Order (as amended in July 1941 to provide for payments to cooperatives) denoted or designated any such thing as a Class II handling allowance. The Order as presently in effect does provide for a so-called "Combined Plant Handling and Transportation Differential." The Class II price is fixed by an extremely complex formula. The concept that in the formula for computing the Class II price a certain part of the prescribed deduction, stated in cents per cwt., represents a so-called Class II handling allowance has been developed in the approach of government economists and others working under Federal Orders. To those initiated in the complexities of government regulation of the milk market, this concept is not unfamiliar. The Secretary, and the Department of Agriculture, however, have never made any official statement or finding breaking down in detail, or explaining the significance of, the various deductions prescribed in the computation of the Class II price.

In the second place, the Class II price is either fixed in accordance with statutory standards or it is not. If the Class II price is fixed in accordance with statutory standards, any handling allowance on Class II milk, deducted from producer returns, *must be what it purports to be*—a fair business allowance to a handler for the reasonable costs of an efficiently run country station.

Consequently the statement by the deponent Smith (page 20):

"Therefore, a lower uniform handling rate, together with a pool payment to compensate for the extraordinary high costs of operating cooperatives for servicing the market *appeared fair*" (italics supplied)

is misleading, unless the words "*appeared fair*" are interpreted to mean "to have an appearance of fairness absent in fact." There is no economic fairness to producers in the proposition advanced by the deponent Smith for the following reasons:

215 A lower uniform handling rate has to be by definition applicable to all handlers. If a cooperative association has such "extraordinary high costs" that the so-called handling allowance does not defray them, then either the handling allowance is unfair to the cooperative or the cooperative is not efficiently operated. If the handling allowance is unfair to the cooperatives, this unfairness can not be rectified, in justice and equity, by taking moneys out of non-member producers for cooperative payments to rectify the deficiency in the handling allowance. If the handling allowance does not defray cooperative costs because they are excessive due to inefficiency of operations, it is manifestly unjust to have non-member producers bear the economic burden of these excessive costs through the medium of the cooperative deduction.

(14) Statements on pages 22 and 23 of Affidavit.

These statements are not accurate.

The evidence before the Secretary does not amply demonstrate:

(a) the alleged type of services resulted in benefits to non-member producers;

(b) that they constituted an integral part of the structure of this market;

(c) that such services were distinguishable from other activities of cooperatives which affect members only, and that rates of payment prescribed were com-

mensurate with the cost of the services for which payment was sought.

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Affidavit of Thomas G. Stitts

(12) Statement on page 2.

"Cooperatives in the Boston area took an important part in sponsoring that legislation and subsequent amendments affecting milk marketing. They proposed the order regulating the handling of milk in the Boston marketing area, which was the second milk order issued, and during the twelve public hearings on proposals for that order and amendments thereto which have taken place since February 1936, those cooperatives have performed the major part of the groundwork necessary to promulgation of such regulations by the Secretary of Agriculture. Such services rendered by cooperatives have led the Secretary to be extremely reluctant to consider requests for Federal orders in markets where a well-organized cooperative does not exist, particularly because producers have to assume responsibility for approval of orders, and cooperatives promote understanding of the problems involved."

This statement is inaccurate for the following reasons: Cooperatives have rather openly opposed the holding of hearings, despite the fact that serious marketing problems existed, because they feared that they might not be able to obtain amendments which they particularly desired. Many of the amendments to the Act itself, as well as to the order, have been sponsored by the Department of Agriculture. In a number of the hearings, the proprietary dealers in the market, and representatives of the market administrator's office, have offered more testimony and more constructive testimony than the representatives of the cooperatives. This was particularly true in the last hearing. The primary reason the Secretary has been reluctant to consider requests for Federal orders in markets where a well-organized cooperative does not exist is that producer approval of the order probably could not be obtained without the cooperatives voting their members as a unit. The primary reason is not the services the cooperatives render in carrying out ground work necessary to promulgation.

(13) Statements on page 3.

"It is my opinion that much of the non-member objection to contributing to the cost of obtaining and presenting economic evidence and contributing to the expense of maintaining operating plants arises from the lack of understanding of what is involved and of the fact that such work is required to be done by producers themselves. The Dairy and Poultry Branch contributes impartial pertinent economic data during public hearings, but in order to furnish all of the information necessary to the promulgation of an order or amendment, as plaintiff Stark appears to suggest in his affidavit that the Government should do, the Division would need a greatly increased staff of specialists and fieldmen to duplicate the work now done by cooperatives and public hearings under such circumstances would bear slight resemblance to the democratic process prescribed by Congress."

So far as these statements are of opinion, the opinion is not based on fact. So far as these statements are of fact, they are misleading because they contain half-facts, omitting pertinent related facts necessary to comprehend the entire picture. To illustrate, the statement that the Dairy and Poultry Branch would be faced with the necessity for additional specialists and fieldmen to duplicate the economic information furnished by cooperatives at public hearings, is misleading, without a further revelation to the Court of the following facts:

1. The Market Administrator under Order No. 4 has had and still has an elaborate office in Boston with an ample staff of assistants including specialists and fieldmen. He receives very substantial sums of money, averaging approximately \$20,000 per month, from an assessment levied on milk handlers by Sec. 904.12 of the Boston Order for expenses of administration.

2. The Federal Milk Administrator is specifically charged by the Boston Order with the following duty. (Sec. 904.4 (3).)

"to prepare and disseminate for the benefit of producers, consumers and handlers such statistics and in-

formation concerning the operation of this order as do not reveal confidential information."

3. The Federal Milk Administrator and his staff are competent persons who are intimately familiar with the operation of the Boston Order. In the course of their duties they should and do collect all pertinent economic information. They offer large amounts of testimony at public hearings on amendments to the Order. The Market Administrator and his staff have available, and offer as much evidence, and disseminate as much information, as the conscientious performance of their duties requires. The scope of their duties fixed by the Order itself to prepare and disseminate information for the benefit of producers, consumers and handlers, which in its nature includes furnishing data and testimony at hearings, is not subject to restriction or enlargement dependent upon what information cooperatives gather or present at public hearings. Nor is there any impairment of "the democratic process prescribed by Congress" in any conceivable expansion of the evidence and testimony presented by the Market Administrator and his representatives for the benefit of all interested parties—handlers, producers and consumers:

4. Much valuable evidence and testimony is furnished by persons other than cooperatives at public hearings. Representatives of Agricultural Colleges and general farm organizations present evidence which is helpful to producers. They receive no subsidy from the pool. Proprietary handlers are interested in a stable market, in efficient marketing and in a large volume of fluid milk sales. They present evidence helpful to producers on these subjects. At the last hearing in Boston in March 1946, the testimony offered by representatives of proprietary handlers on the following topics was more directly in the interests of producers' income than that offered by many of the cooperatives: (a) the Class I price level; (b) the provisions in the Order for butter and casein prices; (c) transportation allowances; (d) seasonality.

5. The primary purpose of a given cooperative is to improve its own economic position in the market *vis a vis* other handlers, other cooperatives, and non-member producers. Its evidence at hearings is offered to that end. If its evidence benefits all producers, that result is entirely accidental and incidental to furthering its own ends. Its 219. fiduciary relation as the bargaining agent for its own members precludes any sacrifice of their interests for any non-member group and, perforce, makes any cooperative a special pleader in its presentation of evidence. There is in fact no complete identity of the economic interests of the producers belonging to one cooperative with those belonging to other cooperatives or to no cooperative.

(14) Statement on page 4 of the Affidavit.

The general dissertation as to the problem of surplus milk and market-wide equalization contained on page 4 is subject to the same comments and limitations which are set forth on pages 8 and 9 hereof with regard to the similar discussion contained in the Smith Affidavit on pages 9, 10 and 11.

(15) Statement on page 5 of the Affidavit.

"The larger cooperatives, including those in the Boston area, have developed and maintained *trained marketing specialists*, economists, statisticians, fieldmen, etc., to keep their members informed concerning economic conditions in the dairy industry as they applied to the members." (italics supplied)

This statement is inaccurate. Among all the cooperatives in the Boston market there are employed only two trained economists or statisticians. One of these, C. W. Swonger, is employed by one of the bargaining cooperatives, the New England Milk Producers Association. The other, C. W. Smith (whose Affidavit has been previously discussed), is employed jointly by three of the operating cooperatives. While these cooperatives employ persons who might be called statisticians, these two men, Smith and Swonger, are the only professional economists or statisticians or marketing specialists in the employ of Boston.

cooperatives, and they had achieved this professional stature prior to becoming employees of these cooperatives. The other employees who may be included by the deponent Stitts in the term "marketing specialists" are primarily operating or managerial employees who are familiar with marketing problems in the dairy field. Their primary duty is the direct day to day marketing of the milk handled by the cooperatives. A similar class of employees perform similar duties for proprietary handlers.

During the period from August 1941 through June 1946, cooperative handlers received a total of \$384,115 out of the Boston equalization pool, through the medium of payments at the rate of one and one-half cents per cwt. on member milk. The primary justification for these payments relied upon in the Stitts and Smith Affidavits, as well as in the report of March 18, 1944 of the Director of Food Distribution in connection with amendments to the Boston Order (9 Fed. Reg. No. 57, p. 3057-3060), is the "cost of obtaining and presenting economic evidence" (Stitts Affidavit, p. 3). There have been six public hearings on amendments to the Boston Order since the provisions for cooperative payments were inserted in the Order in August 1941. This includes one very brief hearing lasting a day in Washington in June 1943. At this rate, producers paid \$97,352.00 per hearing for the evidence gathered and presented by cooperatives at these hearings, which shows the fantastic relation between the payments and the cost of any services for which they are alleged to be compensation. A substantial portion of the cooperative evidence was, of course, directed to the justification of the payments themselves, or proposals for certain modifications in the rates prescribed. With \$584,115 at their disposal for this purpose, over a five-year period the cooperatives could have employed twenty men at \$5,000 per year for full-time work gathering economic statistics and data and still have \$84,115 left over. This \$584,115, however, has been turned over to cooperatives with absolutely no check as to the manner of its use by them. According to testimony of Harry M. Welts, Senior Marketing Specialist employed by the Federal Milk Market

Administrator in Boston, in the hearings on amendments to the Boston order in March 1946, "it is impossible
221 to say that the one and one-half cent payments were used for specific purposes except by arbitrary allocation." (Record. Hearings on Amendments to Boston Order, March 11, 1946, page 1722.)

(16) Statement on page 5 of Stitts Affidavit.

"The successful establishment of cooperatives has naturally been attended by many obstacles. Those with whom they have come in competition in securing control of the milk supply have been resourceful and active. They have appealed to the guilelessness and cupidity of members with a view of breeding dissatisfaction on their part with the associations and inducing them to breach their contracts with the cooperatives, and in a number of instances have promoted litigation and legislation intended to defeat cooperative ends or to discourage their growth."

This statement does not purport to be of any fact or evidence in the hearing record. To test its accuracy would require an analysis of the facts in every economic or social controversy in the history of the cooperative movement. Whatever the obstacles may have been which were encountered by cooperatives in their attempt to secure control of the milk supply, either from other cooperatives or from proprietary dealers, they do not of themselves entitle the cooperatives to enforced payments from non-member producers under the Boston Milk Order.

(17) Statement on page 6 of Affidavit.

"The hearing record on the Boston order showed that cooperatives supplying the Boston market were engaging in numerous activities highly beneficial to the farmers in the area, such as . . . (2) assumption of responsibility for a reserve of milk to meet the irregular needs of distributors; which is essential in a market which provides market-wide equalization of returns among all producers of the total value of the milk; and manufacture of surplus milk to insure producers fair return on that milk. The greatest service rendered, of course, was their assistance in achieving stabilization of the market."

These statements are inaccurate for the following reasons.

222 1. The record shows no *assumption of responsibility* by cooperatives for a reserve supply of milk to meet the irregular needs of distributors if the term "assumption of responsibility" is intended to indicate any legal or moral commitment by cooperatives so to do. Since the provisions for cooperative payments have been in effect, cooperatives have shifted their surplus burden to buying handlers, avoided the problem of emergency supplies, exploited to the full the attractive market for surplus skim milk, and charged handlers premium prices on inter-handler sales.

2. The record shows, and there is in fact, nothing more or less essential about a reserve supply of milk in a market which provides market-wide equalization of returns among producers" than in a market which has a dealer pool.

3. The record shows, and there is in fact, nothing done by cooperatives in the manufacture of surplus milk which insures producers generally, as distinguished from members, a fair return on that milk. With regard to the manufacture of surplus the Order establishes a minimum price to be paid for surplus milk, which is presumptively a fair price. Proprietary handlers must pay such prices. If any cooperative makes a profit or saving on its manufacture of surplus, that profit or saving goes to its own members.

(18) Statement on page 6 Stitts Affidavit.

"There is no doubt that but for the efforts of the cooperatives there would have been no Boston order,"

If this statement means that the cooperative votes in favor of the issuance of the Order made its promulgation possible under the Statute, it is correct. The Secretary of Agriculture, however, has statutory duties and responsibilities in connection with the promulgation of milk orders including the Boston order. Aside from the feature of
223 cooperative voting, cooperatives can not prevent his

issuance of a milk order if his concept of his statutory responsibility requires him to take such action. Any benefits to producers from the Boston milk order rest in the final analysis upon the intelligent performance of public duties by those to whom Congress has entrusted the right and power to act in the premises.

(19) Statement on page 7 Stitts Affidavit.

"All the costs of the aforesaid services until August 1, 1941, were borne in the Boston area by members of the cooperatives, and the hearing record shows that assessments for the support of such services ranged from 3 cents to 10 cents per cwt. of milk sold. In addition, special assessments were imposed frequently to pay unexpected expenses and in some cases deductions from payments for milk in the nature of a loan were made to finance cooperative activities."

This statement is not accurate for the following reasons.

1. All of the cost of the "aforesaid services," (the promotion of beneficial legislation, presentation of evidence at hearings, study and research on the marketing problems) were not borne by cooperative producers. There were many groups including State Agricultural Colleges, non-member producers, handlers, Federal government officials, who performed some one or all of the services mentioned without charge to cooperative producers. The cooperatives were by no means bearing the entire cost of progress for milk producers in the market. They were bearing the cost of such services as they voluntarily undertook to promote the good of their own members. The performance of past services does not give them a lien or claim on producers' money in the equalization pool for future periods of time, when the disbursement is made with absolutely no check-up as to how it is being used.

2. The cooperative assessment rates on members were within the ranges stated in the Affidavit. However, there was no evidence in the hearing record that (a) they represented the efficient costs of all the described services or (b) that they represented any specific part of the costs of the alleged services rendered non-mem-

bers. There was no indication of what part of these assessments represented financial investments on the part of members.

(20) Statement on page 7 of Stitts Affidavit.

"With members subject to such assessments, it is not difficult to understand that such costs decidedly tended to limit the scope of cooperative activities and to discourage many farmers from joining, especially as minority groups remaining aloof enjoyed the benefit of such activities while the saving in assessments gave them a higher price for their milk. It has been suggested that if the cooperatives are deprived of the payments provided in the Boston order, they still will continue their activities. That probably is true, although the cooperative representatives during the hearing indicated that the activities would have to be restricted if members were to carry the whole cost in the future, but that does not render it either fair or progressive to compel members to pay the entire cost."

This statement about the discouraging features of membership in a cooperative organization to which other persons are free *not* to belong or pay dues, is, in part, a statement of the deponent's social philosophy; in part a statement of alleged fact. From the factual aspect, the statement is not accurate. Cooperatives exist in twenty-two or more major markets operating under Federal milk orders *without* cooperative payments from the pool. Their members are not thereby discouraged.

The statement as to the "fair and progressive features" of forced payments to cooperatives by non-members is a matter of personal opinion. There are many voluntary organizations engaged in promoting social programs which benefit a general class of persons including non-members. Veterans' organizations have to survive without enforced contributions from veteran non-members who may derive the benefit of the organization's program or appearances before legislative committees. So do milk and other agricultural cooperatives in the United States. Forcing

225 milk producers in a market to contribute to the support of a cooperative, whether they desire to do so

or not, tends to destroy the voluntary self-help character of the whole cooperative marketing movement among American farmers. Cooperatives which require the prop of enforced non-member contributions to survive are inherently weak.

To the extent that there is any problem with respect to discouraging farmers from joining cooperatives because of price differences due to member assessments, there is a specific method provided in the Act to meet this problem, at least partially. Section 8c(5)(E) of the Act provides that a milk order may contain the following term:

"Providing (1) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection (5), for market information to producers and for verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers and (11) for assurance of, and security for, the payment by handlers for milk purchased." (italics supplied)

Under the term of a milk order a service assessment may be made against non-members for meeting the specific expenses incurred by the Market Administrator in giving these non-members information, and in performing the specified services for them. This method has been adopted in other Federal milk orders. Prior to 1941 the Boston order contained such a provision. This statutory term permits the non-member producer to receive and pay for *tangible* services rendered him by a disinterested and competent government official. The resulting deduction from the non-member's milk price would tend to bring his "take home" return for milk to the same level as that of the cooperative member. Under such a statutory term, the only disparity capable of existing in the milk prices of members and non-members could only arise from the cooperative's assessing its members more than the Market Administrator charged non-members for the services specified in the Statute. This could only happen if the cooperative did *more* in the way of servicing its members than

the Market Administrator did for non-members, or performed the same services in a less efficient and more expensive manner. If the cooperative members received more service than non-members, they should be willing to pay for it. If they paid more than non-members did for the same services they could and should correct the practices existing in their own organization which created the disparity.

(21) Statement on page 8.

"The record showed that such operating cooperatives maintain a reserve milk supply which enables handlers to supply the varying consumer demand at all seasons, that by manufacturing the surplus milk, the operating cooperatives provide producers with a greater financial return on their milk than they otherwise would receive, and that readily available manufacturing outlets for the surplus tend to strengthen the market for all producers' milk, help to promote the orderly and efficient distribution of milk and support the price of Class I milk. Furthermore, while the proprietary handlers are interested in the processing margin, the cooperative handlers are interested in the returns to producers, and it is believed that the payments to the latter constitute an incentive to endeavor to sell a larger percentage of their milk for Class I use and thereby increase the Class I price enough to offset the payment."

The statement quoted appears to be in part a statement of the deponent's conclusions from the hearing record and also a statement of alleged facts (note particularly the last sentence): The hearing record speaks for itself as to what it does or does not show. As representations of facts, present or past, the statements are inaccurate and incomplete for the following reasons.

1. Cooperative handlers are as much interested in processing margins as proprietary handlers.

2. Cooperatives are interested in "returns to producers," only if the phrase is limited to their own producers.

227 3. In two of the last three years cooperatives did not maintain a reserve supply to meet market needs.

They have been manufacturing less and less surplus, and manufacturing less of it in their own facilities; they have processed a greater proportion of their surplus into low value products than has been true for other handlers in the market. The market administrator has had to make public demands for the release of surplus milk so that it might be used for Class I purposes. On milk sold to proprietary handlers the cooperatives have charged premium prices ample to take care of their costs.

(22) Statements on page 9.

“ . . . Furthermore, the assumption of that responsibility entails maintenance of an extensive, managerial establishment in order to make certain as an association of members' patronage and to keep members in touch with such operations.”

“Proprietary handlers have not consistently performed such service in the past, and there is no evidence in the hearing records of any of the Federal milk orders which contain cooperative payment provisions that they intend to perform it in the future.”

These statements contain the representation in substance that cooperatives have assumed a responsibility to supply fluid milk to city distributors; that proprietary handlers have not assumed such a responsibility; and hence the former group is entitled to the pool payments. The fact is that there is no moral or legal assumption of such responsibility by either group of handlers. Proprietaries and cooperatives sell milk to other distributors when it is in their self interest to do so. The alleged differentiation between their purposes and facilities in this regard is artificial. This is shown by the fact that E. W. Gaumnitz, Director, Divisions of Marketing and Marketing Agreements, Agricultural Adjustment Administration, Department of Agriculture testified on April 1, 1940 before
 228 a subcommittee of the Committee on Agriculture and Forestry, United States Senate, Seventy-Sixth Congress in favor of a specific amendment to the Agricultural

Marketing Agreement Act in legislation then proposed, S 3426, which would have authorized the Secretary to insert in milk orders a term providing:

"reasonable compensation (to be paid out of any such pool or fund) as determined by the Secretary, to operators of plants where milk is received from producers and which are not equipped for manufacturing, for services rendered to the market in diverting and disposing of surplus fluid milk during periods of excess supply, and to operators of condensing, evaporating or drying plants for services in furnishing fluid milk to the market during periods of insufficient supply."

Mr. Gaumnitz said of this provision (Hearing Record p. 53):

"This amendment also specifically provides for another kind of payment, *not limited to cooperative associations* for the disposition of surplus fluid milk in flush seasons, and in the maintenance and release of available supplies in short seasons, in such a manner as will maintain maximum stability supply and prices in the market." (italics supplied)

It is inconceivable that the Department of Agriculture should go on record in favor of legislation authorizing the granting to proprietary handlers of essentially the same service payments as cooperatives receive here if the statements in the Affidavit, purporting to make a sharp distinction between cooperatives and proprietaries in performing these functions, were accurate.

Statement p. 9 (Cont.)

"On the basis of testimony in the hearing record and my personal study of and experience with dairy cooperatives, which includes close consideration of similar provisions for cooperative payments in the New York and Cincinnati orders, it appears that the services rendered to the market as a whole are beneficial to all producers in the area, that sharing of the costs of such services is fair and equitable, and that such costs are a distinct and proper economic factor in the pricing of milk in the marketing area, and, there-

fore, incidental to the other provisions of the act and order."

229 All these statements of fact are disputed. The reasons for their inaccuracy have been for the most part previously outlined in analyzing the subsidiary statements on which they rest. However it is particularly desired to note the misleading implications of the statement:

"Such costs are a distinct and proper economic factor in the pricing of milk in the marketing area."

If it is meant by this statement that alleged service costs of cooperatives should be reflected in prices the cooperatives charge other handlers for the milk they sell, the generalization might be allowed; *provided it is understood that provisions for payments from the pool here in issue do not operate in this manner.* Under the provisions here in issue the payments for cooperative service costs come out of the producers equalization fund. A deduction is made from the blended price to producers to provide the payments. The provisions are *not* a means to permit cooperatives to charge a higher price to the handlers to whom they sell milk for alleged services. Cooperatives have always been free so to do.

(23) Statement on page 11.

"There has been no showing, however, sufficient to justify elimination of the payments."

This statement is not accurate. There has been ample evidence since August 1, 1941 in hearing records before the Secretary to justify elimination of the cooperative payments.

(24) Statement page 11.

"That being so, to allow the operating cooperatives part of those costs out of the pool gives the cooperatives no appreciable advantage over proprietary handlers."

This statement is not accurate. The payment does give the operating cooperative an appreciable advantage over proprietary handlers.

(25) Statement pages 14-15.

"The amendments required further that the cooperatives should make reports to the Market Administrator concerning the payments and that their books and records should be open to audit by the
230 Department of Agriculture. It was provided, also, that eligibility to receive payments may be cancelled whenever the Secretary determines upon the basis of such reports and audit that cooperatives are not complying fully with the requirements of the order."

This statement contains a misleading series of half facts. The so-called requirements for reports by cooperatives have been in practice a dead letter. Reports have not been required. The Secretary can not determine anything on the basis of reports which he has never received. See Request for Admissions of Fact, paragraph 9, and defendant's response thereto.

(26) Statement page 15.

"The rates of payment provided in any order, particularly the rate to the operating cooperatives, are to some extent experimental, and are subject to revision if it appears proper in the light of more definite information as time goes on concerning cost of the services rendered. The operating cooperative payment under the New York order has been revised downward."

This statement is inaccurate and misleading. The plaintiffs have requested the defendant to admit the following fact:

"9. The Market Administrator under Order No. 4 as amended at no time has required reports from cooperative associations as to the use of payments as required by the provisions of Section 904.11(d) of Order No. 4 as amended."

The defendant replied:

"(6) Answering paragraph 9 of the Request, defendant admits the truth of the facts alleged therein; and says further that at the time Section 904.9 was added to Order No. 4, no one could say what types of reports, if any, would be necessary to proper administration of the order as amended effective August 1, 1941, and that, therefore, no requirements for reports was included although the Market Administrator was authorized therein to request reports if he deemed it necessary to do so. And defendant says further that the matter of reports by such cooperatives has been discussed at various times and is still pending for administrative decision; and defendant farther says that cooperatives are required to file with the Market Administrator annual balance sheets and operating statements and prior to receiving any payment, each qualified cooperative must file a claim with the Market Administrator and certify that the payments of $1\frac{1}{2}\%$, the only payment the use of which is restricted by the provisions of Order No. 4, as amended, have been used in accordance with the provisions of said order."

231 In fact the annual balance sheets and operating statements filed by the cooperatives ordinarily furnish no information with respect to the use of such associations of the one and one-half cent payment.

The affidavit states that the rates of payment "are to some extent experimental and are subject to revision . . . in the light of more definite information . . . concerning costs of the services rendered."

The Admissions on file are to the effect that the provision for reports in the Order were experimental, that the matter of reports is still pending for administrative decision, and that no reports as to the use of the payments have been required.

Five years have passed since the contested provisions went into the order. Over a million dollars of producers' money has gone out through the medium of the contested payments. Not only have there been no reports required, but "the matter of reports is still pending for Administrative decision," according to defendant's Admission on file.

The quoted statements from the Stitts Affidavit which indicate a possibility and probability of intelligent revision of rates based on cost information do not give a correct picture of the facts in this matter.

(27) Statement on page 16.

On page 16 of the Stitts Affidavit, statements are made as to:

- (a) the average monthly deductions from the pool for the contested payments;
- (b) the decrease in producer price resulting therefrom.

Complete and detailed statements on these subjects in terms of actual payments and their effect in reducing the blended price are contained in Exhibit I to the Plaintiffs Request for Admission of Facts, which are admitted by the defendant to be true.

232 (28) Statement on page 16.

"As pointed out in Mr. Smith's affidavit, this reduction has been more than set off by the reduction in the handling allowance on Class II milk of $4\frac{1}{2}$ cents per cwt. to all handlers. The two amendments were considered together and depended upon each other."

This statement is challenged for the same reasons as the similar statement in the Smith Affidavit. See pages 15, 16, 17 hereof.

Base-rating provisions

From time to time the Government has indicated that the payments to cooperatives are authorized by the language in the Act commonly referred to as the "base-rating provision." It seems appropriate therefore to set forth the economic history and meaning of this provision.

The base-rating provision occurs in Section 8c(5), which specifies the various provisions which may be included in a milk marketing order. Subsection (B) provides for setting up the mechanics of an equalization pool in order

to return a uniform price to all producers per hundred-weight of milk delivered. The uniform price may, however, be subject to certain differentials, depending on quality, location from the market, and the like, and may also be subject to:

" . . . (d) a further adjustment equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time."

Base-rating has long been established in the dairy industry, not only in New England but in other parts of the country as well, as a convenient method for equalizing the benefits of the fluid market among the various producers in a pool. The "base" assigned to each producer is the volume of milk for which he will be paid the Class I price. Deliveries in excess of his base constitute surplus, and are paid for at Class II prices. Prior to Federal regulation, the "pool" consisted of the various producers 283 delivering to a single handler, or, in some cases, of all the producers marketing their milk through a single bargaining cooperative. In either case, the normal fluid outlets of the pool determined the total amount of milk which could be paid for at Class I prices and hence the total of the bases. The allocation of bases to individual producers was then made in proportion to their deliveries during some representative period. Since payment to producers on the basis of base-ratings offered an incentive to even production throughout the year, it provided advantages which could not be obtained by a system of uniform pricing for all milk to all producers.

Base-rating systems have been in effect in the Boston market since 1918, operating for the most part through the pool of producers selling to each individual handler and members of New England Milk Producers Association, the largest, and for a time the only, bargaining cooperative in the market. This earlier practice was incorporated in the licenses issued under the authority of the

Agricultural Adjustment Act in 1933 and 1934, and was likewise made a part of Order No. 4, as originally promulgated on February 9, 1936. At that time the Dairy Section's economic brief in support of the order explained that the purpose of the base-rating provisions was:

"equitably to apportion, according to production during a representative period of time, the total value of milk for each delivery period Thus, the plan of making each producer's base equal to his production during the short season of production is an equitable method of pro-rating the fluid milk market among producers That the base rating plan is a commonly accepted market mechanism is evidenced by the large number of milk markets wherein the proceeds of sales to handlers are pro-rated to producers through the base rating plan"

Similar base-rating provisions have been included in the orders regulating the milk markets in Fall River, Massachusetts; St. Louis, Missouri; Kansas City, Missouri; and La Porte County, Indiana.

234 The base-rating provisions of Order No. 4 were later eliminated in the revision of the order effective August 1, 1937, upon a finding by the Secretary as follows:

"2. That in view of changes in economic conditions since the date of the original findings, the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for milk so delivered, without the use of a base-rating plan, but with the inclusion of special location differentials, is a fair and reasonable method of distributing to producers the proceeds of sales of milk to handlers"

This change was further explained in the Dairy Division's economic brief as follows:

"A study of the comparison of returns to different types of producers under the proposed plan and those under the rating plan effective in Order No. 4 reveals that the two are perhaps not radically different. In the study, a sample of approximately 15 per cent of the producers in the market was taken. These pro-

ducers were classified as even or uneven. Even producers were defined as all those producers whose deliveries in the quarter of the year in which their daily deliveries were lowest were at least 70 percent of their deliveries in their highest quarter.

It was found that only around one-fifth of the producers in the market could be called even under this definition. These even producers were scattered throughout the milkshed so that, for the most part, their evenness was completely offset by the irregularity of their neighbors. (See table 38.) Only in the nearby zones was there a preponderance of even producers so that, as a group, they showed even deliveries. Nearly two-thirds of the producers located within 40 miles of the market were classified as even. The average of their low-quarter deliveries as a group was over 70 percent of their high-quarter deliveries. Over 50 percent of the producers located between 40 and 80 miles were classified as even, and they, as a group, had an average of nearly 70 percent. No other zone group had an average of 62 percent. It is proposed that these two groups of producers—that is, those located within 40 miles of Boston and those located between 40 and 80 miles—be given location differentials of \$.36 and \$.18 per hundredweight, respectively.

It is thought that the proposed plan, which gives consideration to those producers located nearby the market who are preponderantly even and who as a group have very uniform deliveries, and which returns a price higher than the average to the other even producers, accomplishes the purpose for which the rating plan in Order No. 4 was intended."

It has heretofore been generally assumed that base-rating, as commonly understood in the dairy industry, was covered by § 8(c) (5) (B) (d) of the Act, 235 quoted above; and in view of the fact the payments to cooperatives were unknown in the industry at the time the Act was written, it has never been supposed that they were also covered by the base-rating provision.

Respectfully submitted,

EZRA MERRILL.

Subscribed and sworn to before me this 12th day of November 1946.

[SEAL.]

ANDREW W. ORIOLI,
Notary Public.

My commission expires Dec. 2, 1949.

244 Filed Jan. 15, 1947. Charles E. Stewart, Clerk.

ORDER OVERRULING MOTIONS FOR SUMMARY JUDGMENT

The above-entitled cause having come on to be heard upon the motion of the defendant for summary judgment and upon the motion of the intervenor-defendant, Dairymen's League Cooperative Association, Inc., for summary judgment, and the Court having heard counsel for the respective parties in argument on both said motions, and being advised, it is hereby:

Adjudged, Ordered and Decreed, as follows:

The motion of the defendant for summary judgment and the motion of the intervenor-defendant, Dairymen's League Cooperative Association, Inc., for summary judgment, be and they are hereby overruled.

Dated, January 15, 1947.

F. DICKINSON LETTS,
Justice.

249 Filed Nov. 15, 1948. Harry M. Hull, Clerk.

MOTION BY PLAINTIFFS TO AMEND COMPLAINT

Now come the plaintiffs in the above-entitled case and move to amend their complaint as follows:

By striking out paragraphs 14 and 15 thereof and inserting in lieu of said paragraphs the following numbered paragraphs:

"14. Payments to cooperative associations at the rates described in paragraph 5 hereof were provided for

under the terms of Order No. 4 as amended from August 1, 1941 to August 1, 1947. On August 1, 1947 said Order was amended, continuing the payments to cooperative associations but changing the rates of such payments to 2 cents a hundredweight on milk received from producers at plants of operating cooperatives and 1 cent a hundredweight on milk delivered by members of a bargaining cooperative to plants of proprietary handlers. In the future large sums will continue to be distributed in unlawful payments to cooperative associations and will be dispersed and lost to the plaintiffs and other producers, all of whom are entitled to be paid the blended price computed without deduction for such unlawful payments.

15. The aforesaid illegal deductions have deprived the plaintiffs and over 6,000 other dairy farmers similarly situated of large sums of money. For the 6 years 1942 through 1947 payments to qualified cooperative associations under the provisions of said Order No. 4 have averaged \$226,000 a year."

250 The plaintiffs further move to amend the prayers of their complaint to insert in prayers (1), (2) and (3), and after the words "under Section 904.9 of said Order No. 4 as amended", the words: "August 1, 1941 entitled 'Payments to Cooperative Associations' or under Section 904.10 of said Order No. 4 as amended August 1, 1947 entitled 'Payments to Cooperative Associations'." And to insert in paragraph (4) of the prayers of the complaint, after the words "said Order No. 4", the words: "as amended August 1, 1941 and substantially similar provisions of Section 904.10 (a)-(d) and Section 904.8(b)(5) of said Order as amended August 1, 1941." So that the prayers of said complaint shall read as follows:

"(1) That a temporary restraining order be issued, enjoining the defendant from qualifying or certifying the qualification of any cooperative association of producers under Section 904.9 of said Order No. 4 as amended August 1, 1941 entitled 'Payments to Cooperative Associations' or under Section 904.10 of said Order No. 4 as amended August 1, 1947 entitled 'Payments to Cooperative Associations', and requiring the

defendant to suspend any such qualifications or certifications theretofore made.

(2) That a preliminary injunction be issued during the pendency of this action, enjoining the defendant from qualifying or certifying the qualification of any cooperative association of producers under Section 904.9 of said Order No. 4 as amended August 1, 1941 entitled 'Payments to Cooperative Associations' or under Section 904.10 of said Order No. 4 as amended August 1, 1947 entitled 'Payments to Cooperative Associations', and requiring the defendant to suspend any such qualifications or certifications theretofore made.

(3) That a permanent injunction be issued, enjoining the defendant from qualifying or certifying the qualification of any cooperative association of producers under Section 904.9 of said Order No. 4 as amended August 1, 1941 entitled 'Payments to Cooperative Associations' or under Section 904.10 of said Order No. 4 as amended August 1, 1947 entitled 'Payments to Cooperative Associations', and requiring the defendant to withdraw or cancel any such qualifications or certifications theretofore made.

(4) That the Court declare the provisions of Section 904.9(a)-(d) and Section 904.7(b)(5) of said Order No. 4 as amended August 1, 1941 and the substantially similar provisions of Section 904.10(a)-(d) and Section 904.8(b)(5) of said Order as amended August 1, 1947 to be unauthorized, illegal and void."

By their attorney,

EDWARD B. HANIFY,
50 Federal Street,
Boston, Massachusetts

November 15, 1948.

Let this be filed.

Holtzoff, J.

252 Filed Nov. 24, 1948. Harry M. Hull, Clerk

ANSWER TO AMENDMENTS TO COMPLAINT

Comes now the defendant, Charles F. Brannan, Secretary of Agriculture of the United States, and in answer to amendments to paragraphs 14 and 15 of the complaint herein says:

(9) The defendant admits the averments contained in the first two sentences of substituted paragraph 14 of the complaint and denies the remaining averments of said paragraph.

(10) The defendant denies the averment contained in the first sentence of substituted paragraph 15 of the complaint and admits that payments to qualified cooperative associations under the provisions of said Order No. 4 for the six years 1942 through 1947 have averaged approximately the amount averred.

(12) And in further answer to the complaint as amended defendant says that—

Pursuant to proposals by two cooperatives and several handlers that the cooperative payment provisions of said Order No. 4, as amended, effective August 1, 1941, be deleted and proposals by the Dairy Branch, Production and Marketing Administration, Department of Agriculture, that the language of said provisions be clarified, public hearings were held during which the cooperative payment plan was strenuously opposed by several individual producers, certain cooperatives which were not qualified to receive payments and by H. P. Hood & Sons, Inc., and Whiting Milk Company, the principal handlers in the Boston milk marketing area, but it was officially reported that little or no evidence was submitted which had not been received and considered during one or more previous public hearings; and as a result of said proposals and hearings, said Order No. 4 was further amended, effective March 31, 1942, merely for the purpose of clarifying the meaning of the said cooperative payment provisions of said Order No. 4 and to facilitate administration of said provisions.

Pursuant to proposal by four handlers that the cooperative payment provisions of said Order No. 4 as amended, be deleted; and proposals by six cooperative associations and one handler that all of Section 9 (pertaining to cooperative payments) of said Order No. 4, as amended, with the exception of subsection (c) be deleted or that said section

of said Order No. 4, as amended, be amended to prescribe how payments might be used, to provide for auditing of the expenditure of such payments, to disallow expenditures not specifically provided for, and to require all unexpended funds to be returned to the equalization fund; and a proposal by the Dairy Branch of the Production and Marketing Administration, Department of Agriculture, public hearings were held in September 1942. On March 18, 1944, it was officially concluded on the basis of all of the evidence received and briefs filed in connection with said hearings that no changes should be made in the payment plan with respect to which conclusions had been deferred and that the existing plan of payments to cooperatives, which became effective August 1, 1941, was based on the consideration that to achieve the benefits to all producers which said Order No. 4 was designed to provide numerous activities

254 of producers' cooperative marketing organizations are desirable such as presentation of evidence at hearings concerning the needs of producers with respect to prices for milk and differentials to reflect handling costs to furnish an adequate basis for constructive amendments to the order, study and research with respect to marketing problems common to all producers, educational activities designed to give producers a better understanding of the order, insurance to producers generally of a market for their milk, and assumption of responsibility for a reserve of milk to meet irregular needs of distributors; and that testimony on proposal to eliminate the cooperative payments plan from said order did not show those conclusions to be erroneous.

Thereafter, pursuant to proposal by two cooperative associations that the cooperative payment provisions of said Order No. 4, as amended, be further amended by extending the five-cents payment to bargaining cooperatives and the deletion of the requirement that the membership deduction allowed all cooperatives on all milk be at least one and one-half cents; and a proposal by one cooperative association that all cooperative payment provisions be deleted from the said Order No. 4, as amended; and a proposal by six han-

dlers, including H. P. Hood and Sons, Inc., and Whiting Milk Company, the two principal handlers in the marketing area, that the Secretary of Agriculture reexamine the basis and need for cooperative payments, public hearings were held in January 1946. Thereafter, on the basis of all of the evidence submitted during said hearings and arguments contained in briefs subsequently filed, it was officially concluded that the provisions for payments to operating cooperatives should be revised downward to provide for a two-cents per hundredweight payment on all milk received by operating cooperative associations, and one cent per hundredweight to bargaining cooperative associations on milk received by handlers from producer members of cooperatives; and the cooperative payment provisions of Order No. 4, as amended, were amended accordingly, effective August 1, 1947.

WHEREFORE, having fully answered the complaint as amended, the defendant demands that the complaint as amended be dismissed at the cost of the plaintiffs.

GEORGE MORRIS FAY,
United States Attorney,
Washington, D. C.

J. STEPHEN DOYLE, JR.,
Special Assistant to the Attorney General,
Department of Justice, Washington, D. C.

MARY CONNOR MYERS,
Office of the Solicitor,
Department of Agriculture,
Washington, D. C.

256 Filed Dec. 9, 1948. Harry M. Hull, Clerk

ANSWER TO AMENDMENTS TO COMPLAINT

The answer of Dairymen's League Co-operative Association, Inc., hereinafter called "Intervenor," to the 14th and 15th paragraphs of the amended complaint filed in the above entitled cause respectfully states:

(9) The defendant admits the averments contained in the first two sentences of substituted paragraph 14 of the complaint and denies the remaining averments of said paragraph.

(10) The defendant denies the averment contained in the first sentence of substituted paragraph 15 of the complaint and admits that payments to qualified cooperative associations under the provisions of said Order No. 4 for the six years 1942 through 1947 have averaged approximately the amount averred.

(12) And in further answer to the complaint as amended defendant says that—

Pursuant to proposals by two cooperatives and several handlers that the cooperative payment provisions of said Order No. 4, as amended, effective August 1, 1941, be deleted and proposals by the Dairy Branch, Production and Marketing Administration, Department of Agriculture, that the language of said provisions be clarified, public hearings were held during which the cooperative payment plan was strenuously opposed by several individual producers, 257 certain cooperatives which were not qualified to receive payments and by H. P. Hood & Sons, Inc., and Whiting Milk Company, the principal handlers in the Boston milk marketing area, but it was officially reported that little or no evidence was submitted which had not been received and considered during one or more previous public hearings; and as a result of said proposals and hearings, said Order No. 4 was further amended, effective March 31, 1942, merely for the purpose of clarifying the meaning of the said cooperative payment provisions of said Order No. 4 and to facilitate administration of said provisions.

Pursuant to proposal by four handlers that the cooperative payment provisions of said Order No. 4 as amended, be deleted; and proposals by six cooperative associations and one handler that all of Section 9 (pertaining to cooperative payments) of said Order No. 4, as amended, with the exception of subsection (e) be deleted or that said section of said Order No. 4, as amended, be amended to prescribe how

payments might be used, to provide for auditing of the expenditure of such payments, to disallow expenditures not specifically provided for, and to require all unexpended funds to be returned to the equalization fund; and a proposal by the Dairy Branch of the Production and Marketing Administration, Department of Agriculture, public hearings were held in September 1942. On March 18, 1944, it was officially concluded on the basis of all of the evidence received and briefs filed in connection with said hearings that no changes should be made in the payment plan with respect to which conclusions had been deferred and that the existing plan of payments to cooperatives, which became effective August 1, 1941, was based on the consideration that to achieve the benefits to all producers which said Order No. 4, was designed to provide numerous activities of producers' cooperative marketing organizations are desirable such as presentation of evidence at hearings concerning the needs of producers with respect to prices

258 for milk and differentials to reflect handling costs to furnish an adequate basis for constructive amendments to the order, study and research with respect to marketing problems common to all producers, educational activities designed to give producers a better understanding of the order, insurance to producers generally of a market for their milk, and assumption of responsibility for a reserve of milk to meet irregular needs of distributors; and that testimony on proposal to eliminate the cooperative payments plan from said order did not show those conclusions to be erroneous.

Thereafter, pursuant to proposal by two cooperative associations that the cooperative payment provisions of said Order No. 4, as amended, be further amended by extending the five-cents payment to bargaining cooperatives and the deletion of the requirement that the membership deduction allowed all cooperatives on all milk be at least one and one-half cents; and a proposal by one cooperative association that all cooperative payment provisions be deleted from the said Order No. 4, as amended; and a proposal by six handlers, including H. P. Hood and Sons, Inc., and

Whiting Milk Company, the two principal handlers in the marketing area, that the Secretary of Agriculture re-examine the basis and need for cooperative payments, public hearings were held in January 1946. Thereafter, on the basis of all of the evidence submitted during said hearings and arguments contained in briefs subsequently filed, it was officially concluded that the provisions for payments to operating cooperatives should be revised downward to provide for a two-cents per hundredweight payment on all milk received by operating cooperative associations, and one cent per hundredweight to bargaining cooperative associations on milk received by handlers from producer members of cooperatives; and the cooperative payment provisions of Order No. 4, as amended, were amended accordingly, effective August 1, 1947.

WHEREFORE, having fully answered the complaint
259 as amended, the defendant demands that the complaint as amended be dismissed at the cost of the plaintiffs.

McKENNEY, FLANNERY & CRAIGHILL,
By G. B. CRAIGHILL,
*Attorneys for Dairymen's League Co-
operative Association, Inc., Intervenor,
Hibbs Building, Washington, D. C.*

SEWARD A. MILLER,
New York, N. Y.,
Of Counsel.

CERTIFICATE OF SERVICE

I certify that on December 7th, 1948, I mailed copies of the foregoing Answer of Intervenor to Amendments to Complaint to Edward B. Hanify, Esq., Attorney for Plaintiff, 50 Federal Street, Boston, Massachusetts; J. Stephen Doyle, Esq., Attorney for Defendant, Special Assistant to the Attorney General, Department of Justice, Washington, D. C.

G. B. CRAIGHILL,
Attorney for Intervenor.

260 Filed Jan. 31, 1949. Harry M. Hull, Clerk.

MOTION OF INTERVENING DEFENDANT, DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, FOR LEAVE TO AMEND ITS ANSWER TO PLAINTIFFS' AMENDED COMPLAINT

Now comes the Dairymen's League Cooperative Association, Intervening Defendant, and moves the Court for leave to amend its answer to the Plaintiffs' amended complaint, by adding to its said answer, before the last paragraph thereof, the following:

"(13) Further answering the complaint, as amended, this defendant alleges, upon information and belief, that the plaintiffs herein are merely nominal parties and that this action in reality has been brought and is being prosecuted by and for the benefit of certain handlers of milk in the Greater Boston milk marketing area who have no legal standing to attack the validity of the so-called 'co-operative payment provisions' contained in Section 904.9 of Order No. 4 regulating the handling of milk in the Greater Boston milk
261 marketing area; that the attorneys for the plaintiffs were chosen and paid by said handlers and all expenses of this action have been paid by said handlers; that said handlers are using the names of the plaintiffs herein as a subterfuge because of their legal incapacity to maintain a cause of action.

"(14) This defendant, further answering the amended complaint, alleges, upon information and belief, that since the commencement of this action one or more of the plaintiffs has ceased production of milk, wholly or in part, or has become a member of a co-operative association which is receiving said co-operative payments, or voted in favor of amendments to said Order No. 4 containing such co-operative payment provision and are, therefore, not entitled to maintain this action."

McKENNEY, FLANNERY & CRAIGHILL,
By G. B. CRAIGHILL,
Attorneys for Intervening Defendant.

SEWARD A. MILLER,
11 West 42nd Street,
New York, New York,
Of Counsel.

262 Filed Feb. 24, 1949. Harry M. Hull, Clerk

STIPULATION RE DEPOSITION OF EZRA MERRILL

It is hereby stipulated by and between the parties to the above-entitled action that the deposition of Ezra Merrill, taken before a notary public in the office of the United States Attorney in Boston, Massachusetts, on December 10, 1948, may be used like other depositions despite the inadvertent omission to administer oath to the witness before taking his testimony, said testimony after transcription having been adapted, confirmed and ratified under oath by the witness; and that said deposition shall have the same force and effect as if the oath had been properly administered prior to taking the witness's testimony.

EDWARD B. HANIFY,
Attorney for the Plaintiffs;
MARY CONNOR MYERS,
Attorney for the Defendant.

263 Filed Feb. 24, 1949. Harry M. Hull, Clerk

OPINION

Action By several milk producers for an injunction against the Secretary of Agriculture to restrain him from enforcing certain provisions of an Order regulating the handling of milk in the Greater Boston, Massachusetts, marketing area, and for a judgment declaring the provisions in question to be unauthorized, illegal, and void. Judgment for the plaintiffs.

Edward B. Hanify, of Boston, Mass., Harry Polikoff, of New York, N. Y., and Edgar J. Goodrich, of Washington, D. C., for plaintiffs.

George Morris Flay, United States Attorney, and Mary Connor Myers, of the Department of Agriculture, both of Washington, D. C., for the defendant.

William E. Leahy, of Washington, D. C., and Seward A. Miller, of New York, N. Y., for the Dairymen's League Cooperative Association, Inc., intervening defendant.

264: This is an action brought by several dairy farmers

against the Secretary of Agriculture, to enjoin the enforcement of a section of an Order regulating the handling of milk in the Greater Boston marketing area. The challenged provision directs the deduction of certain sums of money from the producers' settlement fund and the payment of such deductions to cooperative associations. The plaintiffs claim that there is no basis in law for this preferential scheme. The sole question presented for the determination of this court is whether this provision is authorized by statute.

The Order in question was issued by the Secretary of Agriculture under the provisions of the Agricultural Adjustment Act of 1937 (Act of June 3, 1937; 50 Stat. 246; 7 U. S. C. 601 *et seq.*). Among other things, the statute empowered the Secretary of Agriculture to issue orders governing persons engaged in the handling of agricultural commodities (7 U. S. C. 608c). In the case of milk and its products, it was provided that Orders of the Secretary should contain one or more of the terms and conditions enumerated in the statute and *no others* (Sec. 608c (5)). In brief, the terms and conditions permitted by the Act related to classification of milk, minimum prices, time of payment, payment of uniform prices to producers, and payment for certain services to producers, except as to those for whom the services were rendered by a cooperative marketing association. The prices to be paid by handlers and the prices to be paid to producers were to be subject *only* to adjustments for factors expressly enumerated by the statute.

265 In addition, the statute provided that all Orders relating to agricultural commodities might contain one or more terms or conditions therein enumerated. None of these are material in this action except the last, which authorized the inclusion of terms: "(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order." (Sec. 608c (7)).

Pursuant to statutory authority, the Secretary of Agriculture, on July 28, 1941, issued an Order regulating the handling of milk in the Greater Boston marketing area.

This Order was amended on August 1, 1947. The provisions to which the plaintiffs object are found both in the original and in the amended Order. In substance the Orders, insofar as material, may be summarized as follows:

All milk sold by dairy farmers is divided into two classes: Class I, milk sold for use as fluid milk; and Class II, milk sold for use for other purposes, such as manufacture of butter and cheese. Customarily, for economic reasons, the two classes of milk are sold at different prices. The Orders created an equalization plan whereby every dairy farmer (generally known as "producer") receives a proportionate share of the total proceeds of all milk sold in the marketing area, irrespective of whether his milk is used by the purchaser as Class I or Class II milk. The device by which this object is accomplished is known as the "blended price".

The Orders provide for fixing minimum prices for Class I and Class II milk to be paid by the distributors, who purchase from the farmers and who are generally known as "handlers". Each handler pays for the milk that he receives. The Market Administrator, however, computes, on the basis of the minimum prices, the value of all milk sold in the area each month and, after making certain adjustments prescribed by the Orders, calculates a weighted average price, or "blended price", as it is called. Each producer is paid on the basis of the blended price, subject again to certain adjustments. The Orders establish machinery whereby each handler makes partial advance payments to his supplier, while final settlements are later made with the Administrator. Before the blended price is computed, however, the Administrator is required to make a deduction prescribed by the Orders and to pay the amount so deducted to those producers that are cooperative associations of dairymen. No similar payment is made to other producers.

The plaintiffs are producers who are not members of any cooperative association. They dispute the legality of the provision for this deduction and payment to cooperative associations. They contend that this direction exceeds the Secretary's statutory authority and results in an unlawful diminution of the proceeds ultimately paid to them. They

bring this suit as a class action to secure an injunction against the enforcement of this provision and for an adjudication that it is invalid.

In limine the question is raised as to the right of the plaintiffs to bring this suit. It will be disposed of before entering on a discussion of the merits. The Supreme Court has already ruled in this action that on the allegations of the complaint, these plaintiffs, being milk producers who 267- have an interest in the common fund, may maintain a class action in order to restrain the Secretary of Agriculture against what they deem to be unlawful diversion of a part of the money (321 U. S. 288).

It is now urged by the defendant and by the intervenor that actually the interest of the plaintiffs in the disputed payments is comparatively small and amounts possibly to a few hundred dollars. Moreover, it is contended that, in fact, the expenses of the litigation are borne principally, if not entirely, by other persons. It is argued that these circumstances disqualify the plaintiffs from maintaining this action. It would be a dangerous doctrine, however, that would preclude a person from seeking to vindicate his civil rights by a judicial proceeding merely because the encroachment of which he complains is but slight. It would be equally unsound to bar a person from recourse to a judicial remedy merely because the expenses incurred by him in the litigation are advanced or borne by some one else. For example, were this the rule, many a matter involving civil rights could not have been brought before the courts, in cases in which some organization is championing the rights of some poor person. Clearly, the law does not close the portals of the courts to a litigant who receives financial assistance from another person in bearing the expenses of the suit.

It is also contended that the plaintiffs may not maintain this action as a class suit, on the ground that they do not adequately represent the group.¹ This contention

¹ See, e.g., *Weeks v. Bareco Oil Co.* (C.C.A. 7th) 125 F. (2d) 84.

268 is not entirely without merit. It is not necessary to pass on it, however, in view of the fact that the plaintiffs have a right to bring this action in their individual capacity without necessarily denominating it as a class suit. This is not a case in which plaintiffs seek an adjudication of their respective interests in a common fund. It is merely an action to restrain an alleged misapplication of a part of the money. Any person having an interest in the fund may maintain such a suit as an individual. If, therefore, this action does not lie as a class suit, it may be treated as an action by the plaintiffs in their individual capacities. From the foregoing considerations, the conclusion inescapably follows that these plaintiffs may maintain this action. This result brings us to a consideration of the merits.

The Agricultural Marketing Act confers broad powers and wide discretion on the Secretary of Agriculture. The courts may not interfere with the exercise of this authority, irrespective of whether they agree with the expediency or desirability of the Secretary's action. This principle is inherent in the tripartite division of the Federal Government. The Secretary's authority, however, is not unlimited and his discretion is not untrammelled. He must act within the confines and the orbit of the statute. If he transcends these boundaries and promulgates an order that is not authorized by law, the courts have a duty to step in, if the matter is properly presented to them in a justiciable case or controversy.

269 The statute carefully and meticulously enumerates the exact types of provisions that may be contained in a marketing order. The Act expressly adds that the Secretary may include *no others*. In explicitly defining the adjustments that the Secretary may make in computing the price to be paid to producers, the statute again expressly provides that the price shall be subject *only* to the enumerated adjustments. Nowhere does the statute contain any provision authorizing the Secretary to make a deduction from the equalization pool to be paid to co-operative associations.

Agricultural cooperative organizations are properly con-

sidered a highly desirable and beneficent development in the economic life of the nation. For this reason they have long been a favorite of the Congress.² No doubt the Congress, if it chose to do so, might have granted subsidies to them out of public moneys. Conceivably, it might possibly have provided that subventions should be paid to them out of the common fund created under the Milk Orders. The Congress has, however, done neither. An officer of the Executive branch of the Government, by an administrative order, has directed that out of the pool belonging in equity to all of the milk producers, a certain amount should be deducted and paid to cooperative associations, thus depriving the remaining producers of a portion of the money that would otherwise be paid to them. Obviously, no matter how well intended, or even how desirable his action might be, an Executive officer of the Government may not

270 ²⁷⁰ overstep the statutory limitations on his authority. He may not take the property of one person and give it to another.

The defendant and the Dairymen's League Cooperative Association, which has intervened as a defendant, seek to sustain the provision under attack by reliance on the provision of the statute which authorizes the Secretary to include in the marketing Order provisions incidental to and not inconsistent with the terms and conditions specified in the statute and necessary to effectuate the other provisions of the Order (Sec. 608c (7)). The word "incidental" means minor, auxiliary, or subordinate to a principal or primary subject. A thing incidental to an express provision is dependent or ancillary to it. The term does not comprehend something additional to and independent of the principal subject matter. It relates solely to matters of a subordinate nature inherently forming a part and parcel of the main topic.

Thus, in *First National Bank v. Missouri*, 263 U. S. 640, 659, the Court stated:

² See, e.g., 7 U.S.C. 291; 7 U.S.C. 610b (1); 12 U.S.C. 1141e; 26 U.S.C. 101 (12).

"... an incidental power can avail neither to create powers which, expressly or by reasonable implication, are withheld nor to enlarge powers given; but only to carry into effect those which are granted."

In that case, the Supreme Court held that a statute vesting national banks with "all such *incidental* powers as shall be necessary to carry on the business of banking", did not confer the authority to operate branch banks.

In *The Robin Goodfellow*, 20 F. (2d) 924, 925, the court stated:

"'Incidental' obviously means depending upon or appertaining to something else as primary."

271 In *Biggart v. Lewis*, 183 Calif. 660, 668, the court defined "incidental", as "having reference to something which is subordinate to and dependent upon and follows the existence of another and principal thing."

Standard Steel Works Co. v. Williams, 155 Ga. 177, 183, holds to the same effect.

A provision for making substantial deductions from the equalization pool and paying them to cooperative associations, can hardly be construed as incidental to the other parts of the Orders. It is entirely independent and is of major importance. Moreover, the provision can hardly be said to be "not inconsistent" with the terms and conditions expressly specified in the statute. The statute provides that the price shall be subject to adjustments only for enumerated factors. There is no provision for an adjustment by way of a deduction in favor of cooperative associations. Finally, it cannot be properly said that the challenged provision is necessary to effectuate the other provisions of the Order. For all of these reasons, the provision assailed by the plaintiffs cannot be justified under this clause of the statute.

Finally, the Government and the intervenor seek to invoke the canon of statutory construction that administrative interpretation of a statute should be given great weight in determining its meaning. This principle no doubt exists, but is inapplicable in the instant case, for two rea-

sons. First, the doctrine has its principal usefulness in situations involving a continuous uniform administrative construction of a statute over a considerable period.³

Here there has been a single construction resulting
272 in the promulgation of several orders, all within a comparatively short time. Second, this rule should not be applied to an administrative construction involving the administrator's own powers. Surely it would be a strange doctrine that would permit an administrative officer to extend his own powers in doubtful cases by his own interpretation of the statute. It would be a clear case of lifting oneself by one's own bootstraps.

In *Interstate Commerce Commission v. Cincinnati etc. Ry. Co.*, 167 U. S. 479, 510, the Supreme Court held that the Commission lacked the power to fix railroad rates, although the Commission had construed the Interstate Commerce Act as conferring this authority. Mr. Justice Brewer made the following pertinent observations:

"Still again, it is urged that the commission has decided that it possesses this power and has acted upon such decision, and an appeal is made to the rule of contemporaneous construction. But it would be strange if an administrative body could by any mere process of construction create for itself a power which Congress had not given to it."

The legislative history throws an illuminating light upon the question involved here. In 1940, the Senate Committee on Agriculture and Forestry recommended that the statute be amended by explicitly providing specific authority for the
273 payment of compensation to cooperatives out of any pool or funds.⁴ The hearings indicate that the additional legislation was requested by the Secretary of Agriculture. This amendment was not enacted by the Congress. It seems clear that the Secretary must have had

³*Smiley v. Holm*, 285 U. S. 355, 369; *United States v. Shreveport Grain & El. Co.*, 287 U. S. 77, 84; *United States v. Missouri Pacific R. R. Co.*, 278 U. S. 269, 280.

⁴S. Rept. No. 1719, 79th Cong., dated May 29, 1940, pp. 7-8.

some doubt as to his power in this matter. Else he would not have asked for supplemental legislation expressly conferring such authority. Nevertheless, in 1941 the Order was issued with the questioned provision found in it.

The foregoing discussion leads the Court to the conclusion that in including the challenged provision in his marketing Orders, the Secretary exceeded his statutory authority and that consequently the provision should be adjudged illegal and void and its enforcement should be restrained.

Judgment for the plaintiffs. Counsel will present proposed findings of fact and conclusions of law and a proposed judgment.

ALEXANDER HOLTZOFF,
United States District Judge.

February 24, 1949.

274 Filed April 25, 1949. Harry M. Hull, Clerk

FINDINGS OF FACT

This action having been tried by the Court without a jury, the Court makes the following findings of fact and conclusions of law:

1. Order No. 4, Regulating the Handling of Milk in the Greater Boston, Massachusetts, Marketing Area was originally issued by the Secretary of Agriculture, effective February 9, 1936. Among other times, it was amended after public hearings on July 28, 1941, effective August 1, 1941. Section 904.9 of the Order as then amended required the Market Administrator to make payments at the rates prescribed therein to cooperative associations of producers which qualified therefor. Section 904.7(b)(5) of the Order as then amended directed that the amount of these payments should be deducted from the value of the milk of the various reporting handlers in the computation of the blended or uniform price to producers. In promulgating these provisions, the Secretary made the following findings:

"that the provisions relating to the payments out of the equalization pool to cooperative associations per-

forming certain marketing services are incidental to, not inconsistent with, the other provisions of the order, as amended, and necessary to effectuate the other provisions of the order, as amended."

2. Under Order No. 4 as originally issued and amended, all milk sold by dairy farmers is divided into two
 275 classes: Class I, milk sold for use as fluid milk; and Class II, milk sold for use for other purposes, such as manufacture of butter and cheese. Customarily, for economic reasons, the two classes of milk are sold at different prices. The Order creates an equalization plan whereby every dairy farmer (generally known as "producer") receives a proportionate share of the total proceeds of all milk sold in the marketing area, irrespective of whether his milk is used by the purchaser as Class I or Class II milk. The device by which this object is accomplished is known as the "blended price". The Order provides for fixing minimum prices for Class I and Class II milk to be paid by the distributors, who purchase from the farmers and who are generally known as "handlers". Each handler pays for the milk that he receives. The Market Administrator, however, computes, on the basis of the minimum prices, the value of all milk sold in the area each month and, after making certain adjustments prescribed by the Order, calculates a weighted average price, or "blended price", as it is called. Each producer is paid on the basis of the blended price, subject again to certain adjustments. The Order establishes machinery whereby each handler makes partial advance payments to his supplier, while final settlements are later made with the Administrator. Before the blended price is computed, however, the Administrator is required to make a deduction prescribed by the Order and to pay the amount so deducted to those producers that are cooperative associations of dairymen. No similar payment is made to other producers. Provision for this deduction for cooperative payments was introduced into Order No. 4 as amended for the first time by the amendment effective on August 1, 1941.

3. In July 1941, prior to the amendment of August 1, 1941, the Secretary conducted a referendum among Boston milk producers as provided by statute (7 U.S.C. 608c (19)). This referendum gave producers an opportunity to vote only for or against the issuance of the entire Order as amended, and not on the newly proposed provisions for cooperative payments separately and apart from the other provisions of the Order. Of 4,802 producers, non-members of cooperatives, to whom ballots were sent, only 843 voted. Of these, 694 were recorded in favor of issuance of the Order as amended; 61 were opposed. 21 cooperative associations, voting as a unit for their members, cast a total of 1,587 votes in favor of the issuance of the Order as amended. All of the plaintiffs voted against issuance of the Order as amended, except one who did not vote.

4. The provisions with respect to cooperative payments, and the accompanying deduction from producer prices, have remained in Order No. 4 as amended from August 1, 1941 down to the present time. Slight procedural changes have been made in them. On August 1, 1947 the rates of the payments were revised. The Secretary's original finding has never been amplified or amended. At the present time, the cooperative payment provisions of the Order are contained in Sections 904.10(a)-(d) and 904.8(b)(5). The sums of money paid to cooperative associations under the Order have averaged approximately one-quarter of a million dollars each year. Equivalent amounts have been deducted in the computation of the minimum price to producers.

5. The plaintiffs in this action are citizens of the States and reside in the towns stated after their names: Delbert O. Stark, Randolph, Vt.; A. R. Denton, Morrisville, Vt.; George Stebbins, Enosburg, Vt.; and Francis Walsh, Greenwich, N. Y. At the time this action was instituted, the plaintiffs had been delivering milk to the Boston market for many years. They were "producers" as defined in Order No. 4 as amended, and non-members of cooperative associations. The monthly milk deliveries by each plaintiff ranged from 7,000 to 26,000 pounds. The

average annual milk deliveries by the plaintiffs to handlers under the Boston Order, from 1941 to the present time, have been as follows: by Stark 125,000 pounds, by Stebbins, 365,000 pounds, by Walsh 93,000 pounds, by Denton 180,000 pounds. The plaintiffs have an individual interest in the sums deducted from their prices for payments to cooperative associations. The deduction for cooperative payments has applied to their deliveries at rates ranging from 1-2/10 cents per hundredweight to 2-2/10 cents per hundredweight. By the end of 1945, the deduction had taken from these four plaintiffs a total of approximately \$540.

6. For at least a quarter of a century there has been in effect in certain milk markets in the United States a system known as "the base rating plan". Under this system each producer receives a base or quota predicated on the amount of his deliveries during a previous representative period of time. For so much of his current deliveries as are within this base or quota, he is paid a higher price than that applicable to his deliveries in excess of the quota. The base rating plan is entirely unrelated to any plan for payments to cooperative associations out of the equalization fund.

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CONCLUSIONS OF LAW

1. The provisions of Section 904.9(a-d) and Section 904.7 (b) (5) of Order No. 4 as amended August 1, 1941, and the substantially similar provisions of Section 904.10(a-d) and Section 904.8(b) (5) of said Order as amended August 1, 1947, were issued by the Secretary of Agriculture without statutory authority, and are illegal and void.

2. The aforesaid provisions are not authorized by the Agricultural Adjustment Act as amended, as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*

3. The aforesaid provisions are not authorized by Section 8c(5) 6f the Agricultural Adjustment Act as amended, as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 608c(5).

4. The aforesaid provisions are not authorized by Section

8c(7)(D) of the Agricultural Adjustment Act as amended, as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 608c(7)(D).

5. The aforesaid provisions are not incidental to and consistent with the terms and conditions specified in subsections (5) and (7) of Section 8c of the Agricultural Adjustment Act as amended, as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 608c(5), (7), and are not necessary to effectuate the other provisions of Order No. 4 as amended.

ALEXANDER HOLTZOFF,
U. S. District Judge.

Dated 25 April 1949.

279 Filed Apr. 25, 1949. Harry M. Hull, Clerk

JUDGMENT

This cause came on to be tried by the court without a jury 1949, and was argued by counsel, and thereupon, upon consideration thereof, it is Ordered, Adjudged and Decreed this 25th day of April 1949 that:

1. The provisions of Section 904.9(a)-(d) and Section 904.7(b)(5) of Order No. 4, Regulating the Handling of Milk in the Greater Boston, Massachusetts, Marketing Area, as amended August 1, 1941, and the provisions of Section 904.10(a)-(d) and Section 904.8(b)(5) of said Order as amended August 1, 1947, are illegal and void.

2. The defendant be, and he hereby is, permanently enjoined and restrained from authorizing, directing or requiring the Market Administrator under Order No. 4, Regulating the Handling of Milk in the Greater Boston, Massachusetts, Marketing Area, to make any deduction from the uniform price to producers under the provisions of Section 904.8(b)(5) of said Order as amended August 1, 1947.

3. The defendant be, and he hereby is, permanently enjoined and restrained from enforcing, or continuing in effect, any deduction from the uniform price to producers under the provisions of Section 904.8(b)(5) of Order No. 4, Regulating the Handling of Milk in the Greater Boston, Massa-

280 chusetts, Marketing Area as amended August 1, 1947.
 4. The defendant be, and he hereby is, permanently enjoined and restrained from authorizing, directing or requiring the Market Administrator under Order No. 4, Regulating the Handling of Milk in the Greater Boston, Massachusetts, Marketing Area to make payment to cooperative associations under the provisions of Section 904.10 (a)-(d) of said Order as amended August 1, 1947.

5. The defendant be, and he hereby is, permanently enjoined and restrained from enforcing or continuing in effect the provisions of Section 904.10(a)-(d) of Order No. 4, Regulating the Handling of Milk in the Greater Boston, Massachusetts, Marketing Area as amended August 1, 1947.

ALEXANDER HOLTZOFF,
U. S. District Judge.

281 Filed Apr. 26, 1949. Harry M. Hull, Clerk

APPLICATION FOR STAY OF JUDGMENT

Now comes the defendant herein, Charles F. Brannan, Secretary of Agriculture of the United States, by George Morris Fay, United States Attorney in and for the District of Columbia, and moves the court for an order staying any proceedings to enforce the judgment entered in favor of plaintiffs herein on April 25, 1949, during the period within which appeal is permitted and, if appeal is taken from said judgment, pending final determination of the case, on the ground that irreparable injury might otherwise result to cooperative associations qualified to receive payments under the provisions of Section 904.10 (a)-(d) and 904.8(b)(5) of Order No. 4, Regulating the Handling of Milk in the Greater Boston, Massachusetts, Marketing Area, issued by the Secretary of Agriculture on July 21, 1947, effective August 1, 1947, inasmuch as the money to which they finally may be held entitled, estimated at approximately \$150,000 per year, would be distributed to approximately 13,556 milk producers with a resulting practical impossibility of recovering same.

And it is further moved that for the protection of both

282 individual producers and dairy cooperatives in the Boston marketing area this court order the Secretary of Agriculture to require the Market Administrator for the Boston marketing area to deposit monthly deductions from the equalization pool established under the provisions of aforesaid Order No. 4, computed and made in accordance with the provisions of Sections 904.10 (a)-(d) and ~~904.8(b)(5)~~ of said Order No. 4, as amended effective August 1, 1947, in a special account in a bank, not to be disbursed until final determination of this action.

And it is further moved that pending application for appeal, and, if appeal is taken, pending final determination of this action, the provisions of section 904.10(a) remain in effect for the purpose of identifying cooperatives referred to in Section 904.10(e), which has no other relation to the cooperative payments provisions, but without which handlers in the area would be unable to comply if no cooperatives were "entitled to receive cooperative payments" and great confusion would be created in the market during the period required for amendment of Section 904.10(e).

GEORGE MORRIS FAY,
United States Attorney,
Washington, D. C.

J. STEPHEN DOYLE, ~~for~~
Special Assistant to the Attorney General,
Washington, D. C.

MARY CONNOR MYERS,
Office of the Solicitor, Department of Agriculture,
Washington, D. C.

283 Filed Apr. 25, 1949. Harry M. Hull, Clerk

ORDER

The motion of the defendant herein for a stay of enforcement of the judgment entered in the above-entitled cause on April 25, 1949, during the period permitted for appeal, and, if appeal is taken, pending final disposition of the case, hereby is granted, and enforcement of said judgment is hereby stayed until final determination of this cause: Pro-

vided, that the defendant shall require that the Market Administrator for the Greater Boston, Massachusetts, Marketing Area deposit all sums representing monthly deductions from the equalization pool established under the provisions of Order No. 4, Regulating the Handling of Milk in the Greater Boston, Massachusetts, Marketing Area, issued by the Secretary of Agriculture, effective August 1, 1947, in accordance with the provisions of Sections 904.10 (a)-(d) and 904.8(b)(5) of said order, in a special bank account from which no disbursements shall be made until final determination of this action.

ALEXANDER HOLTZOFF,
U. S. District Judge.

Dated: April 25, 1949.

284 Filed Jun. 21, 1949. Harry M. Hull, Clerk

NOTICE OF APPEAL

Notice is hereby given this 21st day of June, 1949, that the above defendant hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 25th day of April, 1949 in favor of plaintiffs against said defendant.

GEORGE MORRIS FAY (L.C.E.),
Attorney for Defendant.

Mail Copy to: Attorneys for Plaintiffs, Walter J. Brobyn, Investment Building, Washington, D. C.; Edgar J. Goodrich, Ring Building, Washington, D. C.; Edward B. Hanify, 50 Federal Street, Boston 10 Massachusetts; Harry Polikoff, 120 Broadway, New York City, N. Y.; Attorneys for Intervenors, William E. Leahy, William J. Hughes, Bowen Building, Washington, D. C.

285 Filed Jun. 21, 1949. Harry M. Hull, Clerk

NOTICE OF APPEAL

Notice is hereby given this 21st day of June, 1949, that the Dairymen's League Cooperative Association, Inc., the intervening defendant, hereby appeals to the United States Court

of Appeals for the District of Columbia from the judgment of this Court entered on the 25th day of April, 1949 in favor of plaintiffs against said intervening defendant.

SEWARD A. MILLER,

WM. E. LEAHY,

WM. J. HUGHES, JR.,

*Attorneys for the Dairymen's League
Cooperative Association, Inc., Inter-
vening Defendant.*

Please mail copies to Edward B. Hanify, Esq. of Ropes, Gray, Best, Coolidge & Rugg, 50 Federal St. Boston 10, Mass., Attorney for Plaintiffs, and Hon. George Morris Fay, U. S. Attorney, Attorney for Defendant Charles F. Brannan.

286 Filed Jul. 2, 1949. Harry M. Hull, Clerk

DESIGNATION OF RECORD

Comes now the intervenor, by its attorneys, Seward A. Miller, William E. Leahy and William J. Hughes, Jr., and joins in the Motion of the United States for transmission of original papers herein to the United States Court of Appeals, as and for the Record on Appeal in this case. The intervenor joins in the designation of record filed by appellant, Charles F. Brannan.

SEWARD A. MILLER,

WM. E. LEAHY,

WM. J. HUGHES, JR.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Designation of Record were mailed on July 1, 1949, postage prepaid, to Edward B. Hanify, Esq., 50 Federal Street, Boston 10, Mass., and Edgar J. Goodrich, Ring Bldg., Wash., D. C., attorneys for the appellees, George Morris Fay, U. S. Attorney, for defendant Charles F. Brannan, Wash., D. C.

WM. J. HUGHES, JR.

290 Filed Jul. 18, 1949. Harry M. Hull, Clerk

DESIGNATION BY APPELLANT OF CONTENTS OF RECORD
ON APPEAL

Charles F. Brannan, Secretary of Agriculture of the United States, as appellant, designates the complete record and all the proceedings and evidence in this action as the record on appeal of this case to the United States Court of Appeals for the District of Columbia Circuit.

The Clerk is hereby requested to transmit the entire record, including the various parts listed in Appendix A hereto annexed, to the United States Court of Appeals for the District of Columbia Circuit.

Dated Washington, D. C., June 28, 1949.

GEORGE MORRIS FAY (L.C.E.),

United States Attorney.

J. STEPHEN DOYLE, JR.,

NEIL BROOKS,

Special Assistants to the Attorney General.

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APPENDIX A

1. Relevant docket entries.
2. The complaint filed by plaintiffs.
3. Defendant's motion for summary judgment filed Nov. 25, 1941, with affidavit.
4. Affidavits filed February 11, 1942, of L. A. Cooley and Delbert O. Stark.
5. Order filed Feb. 12, 1942, overruling motion for summary judgment and permitting 30 days in which to answer.
6. Defendant's answer filed March 7, 1942.
7. Plaintiff's motion filed on May 12, 1942, for dismissal of First Defense.
8. Motion filed on May 20, 1942, by New England Milk Producers Association for leave to intervene as party defendant.
9. Notice filed on May 27, 1942, withdrawing motion to intervene.
10. Final judgment filed May 27, 1942, dismissing complaint.

11. Notice of appeal by plaintiffs filed June 22, 1942.
12. Order filed July 27, 1942, extending time for filing and docketing record on appeal.
13. Stipulation filed Aug. 15, 1942, relative to record on appeal.
14. Mandate of Supreme Court reversing judgment and returning for further hearing.
15. Motion of Dairymen's League Co-operative Assn., Inc., filed Sept. 1, 1944, for permission to intervene as party defendant.
16. Order filed Sept. 21, 1944, granting permission to Dairymen's League to intervene as party defendant.
17. Answer and counterclaim of Dairymen's League as intervenor filed Sept. 21, 1944.
18. Motion filed Oct. 10, 1945, to substitute Clinton P. Anderson, Secretary of Agriculture, as defendant.
19. Order filed Oct. 12, 1945, substituting Clinton P. Anderson, Secretary of Agriculture, as the defendant.
20. Motion by defendant filed Oct. 2, 1946, for summary judgment and attached affidavits by Smith, Stitts and Aplin.
21. Request filed Oct. 19, 1946, for Admission of Facts by plaintiffs.
22. Answer of defendant filed Nov. 1, 1946, to request for Admissions.
23. Motion of intervenor for summary judgment filed Nov. 4, 1946.
24. Answer of intervenor to request for Admission of Facts.
25. Motion filed Nov. 9, 1946, to amend complaint, and attached exhibits.
26. Affidavit of Ezra Merrill filed Nov. 13, 1946, in opposition to defendant's motion for summary judgment.
27. Objections of defendant filed November 16, 1946, to motion to amend complaint.
28. Exhibit filed on Nov. 19, 1946, consisting of a certified copy of the transcript of the public hearing held by the Secretary of Agriculture in October 1940 and May 1941 on proposed amendments to the Boston Milk Order.
29. Order denying plaintiffs' motion to amend complaint.

30. Order overruling motions for summary judgment.
31. Order filed March 13, 1947, denying leave to file special appeal.
32. Motion to substitute Charles F. Brannan, Secretary of Agriculture, as defendant.
33. Order substituting Charles F. Brannan, Secretary of Agriculture, as defendant.
34. Motion to amend complaint.
292. 35. Order permitting complaint to be amended.
36. Answer by defendant Brannan to amendments to complain.
37. Answer by intervenor to amendments to complaint.
38. Depositions filed Dec. 11, 1948, of Walsh, Stebbins, Codley, Stark, Albert R. Denton, and Marguerite Denton.
39. Depositions filed Dec. 16, 1948, of Welden and Hood.
40. Motion by intervenor for permission to amend its answer.
41. Order granting intervenor permission to amend its answer.
42. Deposition filed Jan. 31, 1949, of Ezra Merrill.
43. Stipulation with respect to deposition of Ezra Merrill.
44. Opinion of Court.
45. Findings of Fact filed April 25, 1949.
46. Judgment filed April 25, 1949.
47. Application for stay of judgment.
48. Order filed April 25, 1949, granting motion for stay of judgment.
49. Notice of appeal filed by defendant Brannan, Secretary of Agriculture.
50. Notice of appeal filed by intervenor-defendant, Dairy-men's League Co-operative Association, Inc.
51. Designation of contents of record on appeal.
52. Motion that original papers be transmitted, in lieu of copies, as record on appeal.
53. Order approving motion that original papers be transmitted, in lieu of copies, as record on appeal.

293 Filed Jul. 18, 1949. Harry M. Hull, Clerk

CERTIFICATE AS TO SERVICE OF THE DESIGNATION OF THE RECORD
ON APPEAL

I certify that copies of the designation by the appellant Charles F. Brannan, Secretary of Agriculture, as to the contents of the record on appeal in this case were deposited on June 30, 1949, in the United States Post Office, with postage paid, addressed to Edward B. Hanify, Esq., 50 Federal Street, Boston, 10, Massachusetts, and Edgar J. Goodrich, Ring Building, Washington, D. C., attorneys for the appellees; and William E. Leahy, Esq., 821 Fifteenth Street, Northwest, Washington, D. C., attorney for the intervenor, the Dairymen's League Co-operative Association, Inc.

GEORGE MORRIS FAY,
United States Attorney.

EXCERPTS FROM TRANSCRIPT OF 1940 HEARING RECORD ON
PROPOSAL TO AMEND THE BOSTON MILK ORDER

409 ELMER TOWNE was thereupon called as a witness,
pro se, Montpelier, Vermont, and, having been first
duly sworn, testified as follows:

412 Mr. Forest: What particular services does the
Co-op offer that Whiting does not offer?

The Witness: We have a fairly comprehensive Co-operative service at Waterbury so that from the milk—for instance, grain cost at a substantial discount, farm machinery, due to the fact that they have an agency. Butter and cheese—this side line business is quite important to many of us.

The bargaining ability of a co-operative is spread over the entire milk shed.

I believe it is very, very valuable.

420 WALES BROWN was thereupon called as a witness,
pro se, and, having been first duly sworn, testified as
follows:

423 Q. Do you deliver to a co-op?

A. I deliver to the New England Milk Producers.

Q. And a deduction made for dues for that Association?

A. Yes, sir.

Q. What do you consider the services of the N. E. M. P.

A. performs for you?

A. Helps me sell my milk. I would not dare try to sell it alone.

Q. Is that the only service?

A. No, sir, that is the biggest one.

Q. What else?

A. A good many. There are other services it does for me.

Q. Will you name some of them?

A. It helps me to make sure of—of my tests on my milk. The most reason I consider is service to me in selling my milk, as I said before.

Q. What if the Hood Company cut off your milk for some reason, are you guaranteed a market by the N. E. M. P. A.?

A. Yes, sir.

428 FRED DARFLER was thereupon called as a witness, pro se, and, having been first duly sworn, testified as follows:

430 Q. Do you belong to any N. E. M. P. A.?

A. Yes, sir.

Q. What service does N. E. M. P. A. provide for you?

A. In the first place, they guarantee a market if I should have a case of typhoid fever, or any communicable disease which would force me to get out of the market. They would take care of the milk. They would buy what wasn't fit to be delivered. Also, they got me posted on the conditions of the market and act as check on the dealer, while the Hood Company may be absolutely honest there are many dealers that might not be, and the company sees that the farmer gets a fair deal.

462 FRED ROBIE was thereupon called as a witness, representing the New England Milk Producers Association, and having been first duly sworn, testifies as follows:

Q. Are you a member of a Cooperative?

A. New England Dairy.

Q. Will you give your reasons for belonging to a Cooperative?

A. Well, I think that there are benefits to belonging to any milk cooperative. In our particular case, we are running in connection with the milk plant a gasoline and oil station, grain service and store supplies, further than that, I think owing to the fact that the milk cooperatives in New England have taken the initiative getting the Federal milk Order in the Boston Market. That is reason enough for any and all milk producers to back-up some milk cooperative.

465 GEORGE WALLIS was thereupon called as a witness, representing the New England Milk Producers Association, Boston, Massachusetts, and having been first duly sworn, testified as follows:

469 I want to state that I believe most thoroughly in Cooperatives for the reason that such institutions as the New England Dairies, the N. E. M. P. A., United Farmers, and other cooperative organizations, through their influence, I believe have been able to get the license in our Boston Milk shed to stabilize the market, to prevent "dog-eat-dog" situation, which was existing before we had the license.

474 ELMER MONTGOMERY was thereupon called as a witness pro se, of Braintree, Vermont, and, having been first duly sworn, testified as follows:

476 I believe in cooperatives. I shipped milk to a proprietor twenty years, and went through three

strikes. I belong to a cooperative because I want the security. I want the security that goes with cooperation. I am pleased to think that I belong to a cooperative that owns the country and city end of its business. There are a good many things about it which I have enjoyed, which I didn't enjoy under the proprietor ownership.

I think we have been rather fortunate in being able to get the Federal license. I certainly know the dealers who are proprietary dealers would not have asked for it. At least, their attitude in taking it does not show they would have.

477 In our cooperative, we have services which have been, it seems to us, to our advantage.

Whitewashing, they put up ice, gas has a certain reduction at the end of the year, and we have a cow testing association which covers our territory.

There are a few others, numerous things, like small tools that go in with the milk business which most of our producers take advantage of. I think it is a help to the industry. That is all.

There is a contact through cooperatives, also contact between the producers and the consumer. I have enjoyed that very much. I find we are pretty near all alike for making or buying milk. There is another contact with these producers that you meet at the meetings.

You take the problems there, and there is a social side to it.

I guess that is all.

The Presiding Officer: Is that all you have?

The Witness: Yes, that is all.

The Presiding Officer: Are there any questions?

Mr. Merrill: Yes, sir.

The Presiding Officer: You may proceed.

Question by Mr. Merrill:

478 Q. Mr. Montgomery, you listed five services, specific services that your cooperative performs for the members, whitewashing, ice, gas with a dividend

at the end of the year, Cow Testing Association, and I believe you said small tools?

A. That is right.

Q. Are any of these services made available by your cooperative to producers who are not members?

A. No, sir.

538 WILLIAM C. WALKER was thereupon called as a witness, representing the Cabot Cooperative Creamery, and having been first duly sworn, testified as follows:

Direct examination:

The Witness: I am William C. Walker and I represent the Cabot Cooperative Creamery.

I would like to give just a few of the, let me say,
539 of the benefits derived from sending milk into a cooperative plant. The first is that which we have discussed here through questions and testimony, and that is as to the regulation of the price of milk in Boston. Earlier testimony tells you that these cooperatives have been working on this type raise since early June, our cooperatives have spent considerable time and expense in their part, working for this price raise. There are other services besides which our cooperatives carry on, which are, I believe, a benefit to the milk shed as a whole.

The first is in taking care of surplus. Now, in taking care of the surplus, your Class II price depends on to a large extent. If this milk is sold as fluid milk, you get one price. If that is skim milk and turns into the sewer, that helps reduce that price. If turned into casein you get a low price for it. If it is made into certain cheese you get a higher price for it. All according to the way this milk is handled.

So, our cooperative tries to handle and I think other cooperatives do the same, try to handle for their producers, the Class II milk in that way and bring them a greater return.

I will say that our little cooperative probably makes

540 the best butter in the world. Therefore, they are serving public interest all over the state of Vermont. We make cheese that is famous, even among the producers, independent producers, and we sell some of our cheese to them.

Mr. Gague: Not me.

The Witness: It would help your disposition to eat it.

In that way we do a public service. Not only through our own producers do we render many services which other cooperatives do.

One of these is the ice service. I wish to state here those services which we perform in our community are available not only to our own producers but to producers that go to other creameries, too. That is, if we are cutting ice, we will cut ice at cost for any milk producer in our section. The same is true of the sale and delivery of ice if that is what you prefer. We will do that at cost.

I wish to account just one other circumstance which shows what a couple cooperatives can do for producers which a proprietary creamery never will take pains to do, and that is a circumstance which came up a very few weeks ago.

The Boston Board of Health shut out about 200
541 cream producers from sending their cream to the Boston market. They were left without any market. We had the facilities for making butter and giving them a market which was probably equal to what they had been getting. We took on those 200 producers, not as a matter of making money, it was probably a loss to us, but because they were farmers that needed that service, and we gave it to them.

691 MR. GEYER was recalled as a witness, pro se, and having been previously duly sworn, testified as follows:

Direct examination:

The Witness: We gave our position yesterday on this question of local producers, and it seems to me the question

has gotten involved now, so that it should be clarified, and I would like very much to put in the position of the
 692 Hood Company. Any question of station allowances by volume, there are so many factors involved that it would seem very difficult to work out in as much as the production per farm has a great deal to do with the volume in a given plant, and the distance from which the milk must come.

It varies by counties and by states to a point where it would be almost impossible to work out anything in the way of uniform volume deduction that would be fair.

As a matter of fact, the record shows last year you were talking about the Newport plant, when this question was discussed. It shows that our average for the largest volume pounds is 11.6 per hundred pounds of milk in the plant, one of the lowest average costs that we have, and demonstrated clearly there is no direct connection between the volume in the plant and the hauling cost to the farmer.

It varies greatly by communities, and the volume per pound.

With respect to the proposal 3 in the revised list, as to prices sub-section 1, they are proposing to reduce the station charge by subtracting twenty-five cents instead of twenty-eight cents as at the present. I would perhaps think there would be no change in the present method of
 693 figuring Class II milk with the exception that we deduct twenty-two cents instead of twenty-five cents, and that be the only change in the method of figuring Class II milk.

Now, that is based on twenty cents station charge for Class II instead of twenty-six.

I briefly prepared a statement which I think it would save time if I read it into the record. It is only a page long.

Our company has, from time to time, in these hearings criticised the Class II station charge in the Boston Order. The charge permitted for Class I handling of milk seems to be well substantiated by cost figures at twenty cents. If this be true then we recommend that the allowance for Class II be set also at twenty cents. It is our contention, and we make

this in behalf of producers who sell us the milk also, that the cost of receiving, weighing and testing, and cooling or separating Class II milk is no greater than the cost for Class I.

It is our contention that the handling of cream and skim from the point of separation, should be done at the expense of the handler, and not at the expense of New England producers.

There is a certain manufacturing cost to turn
694 skim milk into by-products. That cost is taken into consideration in the formula for Class II. We believe such costs as there are beyond the separator should be added to the cost of by-products and cream and passed on to the consumer of those products. We have throughout Vermont particularly at this time a clear evidence that the allowance on Class II is too large. Handlers of milk are fighting tooth and nail to acquire producers. Cooperatives who are supposed to pay the same price to all pay the full price in some sections of their territory, while they deduct from others in a territory where they have no other outlet for their milk. They do this under the guise of poor quality deductions. In certain territories they haul milk for nothing, picking it up at the farm and hauling it to the plant and paying that farmer the full blended price. In other territories farmers pay the full trucking cost, and in some cases an exorbitant trucking cost. Why this intensive drive for milk that cannot be other than Class II? It is clear to us that the 26 cents station charge puts a premium on handling Class II milk. There is no incentive to compete or solicit for a Class I market in the city.

1009 CLARENCE CARLTON was thereupon called as a witness, representing the New England Dairies, and, having been first duly sworn testified as follows:

Direct examination:

The Witness: I am Clarence Carlton, and I represent the New England Dairies.

I wish at this time to submit a statement regarding the cost of operation of country plants of New England Dairies.

The costs which I will submit include all plants operated by New England Dairies, for twelve months ending June 30, 1940, for own Operated Plants and last fiscal year for the Cooperatives. Includes twenty-nine operations covering thirty-four plants.

1010 I wish at this time to submit a statement regarding the cost of operation of the country plants of New England Dairies. The costs which I will submit include all plants operated by New England Dairies, totalling twenty-two, and all of the cooperative creameries which are member units with the exception of the Granite City Cooperative and Burling Cooperative Creameries. They are excluded on account of the diversity of their operations.

The total number of cooperative member unit operations included is seven, giving a total of twenty-nine operations covering thirty-four country plants. These have been classified according to the operation performed into milk shipping operations, and, manufacturing operations. There are fifteen milk shipping operations, and fourteen manufacturing operations, or, mixed operations.

Our figures do not include any part of the administration costs of New England Dairies. The period used is the twelve months ending June 30, 1940, in the case of the New England Dairies' operated plants, and the latest fiscal year for the member cooperatives' plants. The items of costs included in this calculation are the same as were used in

1011 figuring the costs submitted by New England Dairies at the last hearing at which time the figures submitted were 24.3 cents per hundredweight for milk shipping plants, and, 27.6 cents per hundredweight for mixed, or, manufacturing plants. These figures have simply been brought up-to-date, and the year used is one year later. The average costs for this year are 25.23 cents per hundredweight for milk shipping operations, and 28.38 cents per hundredweight for manufacturing, or, mixed operations. This is an increase of .93 cents per hundredweight for the milk operations, and .78 cents per hundredweight for the manufacturing operations. There are several reasons for these increases. One is the fact that during this period New England Dairies has added two full time men to work

on improvement of quality in the country. This has been necessary because of the more stringent quality regulations of the Market. There have been increases in the cost of certain creamery supplies, and the fuel costs have advanced due to increased prices for fuel oil. The average cost of fuel oil for use in oil burning boilers during the previous year was 5.9 cents per gallon, whereas, during the twelve months ending June 30, 1940, it was 6.75 cents per gallon.

I have here, Mr. Chairman, an itemized statement 1012 covering these operations which I would like to present as an exhibit.

1063 CHESTER W. SMITH was thereupon called as a witness, having been first duly sworn, testified as follows:

Direct examination:

The Witness: In connection with proposal No. 3, which is the one pertaining to deductions from the pool for cooperative associations, the Dairy Division has had prepared under the direction of the Market Administrator some statistical information pertaining to the operations of operating cooperatives in the market with respect to sales 1064 on Class I milk. We wish to offer this data as an exhibit. There are six tables.

The first table is receipts of milk by sources, Class I milk sold to proprietary handlers, and all other Class I milk of operating cooperatives by months for 1939.

The second table, number of proprietary handlers in various groups classified according to number of months in 1939, in which they received milk from operating cooperatives.

This table pertains to the volume and quantity data of the previous table.

Class I milk sold in each month in 1939 by operating cooperatives to all proprietary handlers classified according to the number of months in which buying handler received such milk.

The Fourth table is Class I milk sold in each month of 1939 by operating cooperatives proprietary handlers who

received milk from producers classified according to the number of months in which buying handlers-buyers classified according to the number of months in which buying-handlers received such milk.

The fifth table is Class I milk sold in each month of 1939, by operating cooperatives to producer-handlers classified by the number of months in which buying-handler received such milk.

The last table is Class I milk sold in each month of 1939 by operating cooperatives to handler-buyers classified according to the number of months in which buying-handler received such milk.

The purpose of offering this information is as follows:

In this and previous hearings proposals relative to deductions from the pool to cooperative associations have been made, and in each instance the associations making the proposals have listed one or more services which they allege to perform for the market.

It seems to us these services can be grouped into two general groups. There are services in the market with respect to actual selling operations or what is commonly called the making of milk available for Class I use in the market.

The other main category is on the country end, or what is commonly referred to as the service of offering producers a market for their milk at all times.

As this is obviously a large and involved problem as far as statistical data is concerned, this is only the beginning of an approach to the assembling of information, and what we have here pertains to only one of those major categories; namely, the selling activities in the market, and it is further limited with respect to that category to certain operations of only the operating type of cooperatives.

Coming down to that limitation, the data does try to show on the market-wide basis for only a one year period certain divisions in classifications of these selling activities of operating cooperatives in the market.

1083 GEORGE THOMPSON was thereupon called as a witness, representing the Bellows Falls Creamery, Bellows Falls, Vermont, and, having been previously duly sworn, testified as follows:

Direct examination:

The Presiding Officer: Mr. Thompson, for the record, will you please tell us what your name is, and whom you represent?

The Witness: George Thompson, and I represent the Bellows Falls Creamery.

I would like to make a statement for the record with respect to proposal No. 3. As I stated yesterday afternoon, Mr. Chairman, I am one of a committee which did considerable work with respect to all of the amendments contained in the petitions which were filed by all of the cooperative petitioners in this hearing. The other members of the committee were Dr. Bancroft, Mr. Davis, and Mr. Selby.

We did that at the suggestion of the Cooperatives after considerable discussion and consideration of the market conditions early in the summer, I think in June.

The testimony which I shall give is mine, but it results, and is, I think, largely descriptive of what that committee found, and in so far as it may be opinion, it is my own from that work, study, and investigation, and it is also the judgment and position of Bellows Falls Cooperative Creamery. I believe it to be in accord with the judgments of the eight cooperatives at whose suggestion we acted. We have reported to them. While we do not exactly formally claim to represent them, I believe what I shall say represents their view.

Coming down to proposal 3, I suggest that this proposal, being as it is, a claim for pay for Market Service invites a definition of the service to be paid for, and an examination of the factors which combine to justify it from the point of view of Market-wide economy. Unless we agree—as we may not be in exactly complete understanding with respect to what I mean by market-wide economy, as I used it
1085 here, it comprehends not only the Boston area and

those who buy and sell in that area, we concede it to comprehend the milk shed, and the marketing area, and the interests of the several producers and their communities, processors, retailers, wholesalers, manufacturers, consumers, and in the public interest in a supply which is uniformly adequate and qualified at all times, and at the normal times, and times of emergency. We think the term of nation-wide economy is not only a sufficient number of hundredweight of milk which can be procured for money but that it means an adequate supply at reasonable prices, which, perhaps, is another way of saying a supply from the point of view of the public interests in times of shortage or emergency, will not normally, naturally, deny to supply the market at—I won't say prohibitive—but unreasonable price.

It is also true, I think, that this service which we claim we pay for should find its roots or justification or at least be comprehended in what the Act comprehends, and what the secretary is authorized, I may say, perhaps, directed to consider in connection with fixing prices and formulating methods from which prices to producers result.

For that purpose alone, and as a basis for what
1086 I have to say about this thing, I would like to call attention to the provisions of the Act and to the terms which appear there.

For example, reference in the act to market supply and demand and efficient methods of marketing distribution, insures the sufficient quantity of wholesome milk of "be in the public interest," and most important, we believe, a justification for what has been done in the New York market, and what is asked for at whatever price the Secretary may fix here to be paid and to be received by producers, it must reflect, that is to say, bring back the establishment of these factors.

So that, in connection with our case on this proposal No. 3, it is our suggestion that this record what we think about conditions of supply and demand, and the supply and demand of this market as a tangible idea, and composite quantity. We submit that the supply and demand of the market under the methods of marketing and distribution, current methods, desirable methods, of getting that supply

produced and distributed to the public necessarily comprehends all of the other factors which must be reflected, because supply and demand are no influence, perhaps solely from the point of view of the economic situation, 1087 and affected by the other factors enumerated.

We found in our investigation, and I think that the Secretary in examining this record, should have, undoubtedly, will have a picture of integrated supply in this milk shed. I think the committee was impressed. No one on that committee who had been connected with the production and distribution of milk for a great many years, connections having to do with different organizations, with always differing competitive interests, and I doubt if any of us ever came to a place before where something enabled us to see this Boston Market area supply as a single entity, not to say that it has been there, but perhaps we did not have any occasion to realize it before.

In that connection, the supply of this market comes from a very large distance and sparsely populated territory, the physical geography of which is highly diversified. These are not just words. They are employed in connection with this supply. It extends from Northern Maine to Lake Champlain, and thence to Connecticut, and it is, to some extent, intermingled with the areas of smaller markets within the territory. It has valleys and hillsides, and provides the fertility and grazing to support the dairy herds.

These valleys are widely separated, even relatively small, and without short line communications with other 1088 areas of like character. For local milk plants are not maintained in many of these valleys the farmer producer inhabits. There is here waiting a market and to that extent this city is affected in its supply, and again, always, I refer to this adequate supply as one not subject to price increases during times of short supply. The establishment of such plants located with major reference to economy of hauling and reasonable expense of handling in the circumstances, is essential to efficient methods and orderly conditions of marketing.

Those are the words of the Act. From the producers' point of view—and is essential to the sufficient supply at

whatever may be established prices respecting these factors. This is in the public interests, and it is desirable from the point of view of the consumer in the city whether he be a domestic or industrial consumer.

All over this milk shed, farmer owned cooperatives operating plants which come to exist to supply the common end which are just expressed. Cooperative enterprise has taken this particular form, that is to say, operative as distinguished from bargaining, increasing their apparent necessity throughout the years of its growth. The
1089 necessity stems from the essential profit motive of all proprietary distributions, and a very great variation in the number of profits from which profits are available to different handlers.

However, far be it from me, Mr. Chairman, to attempt to impeach all profit motives of all persons. It is most stimulating, highly deserving, morally justified, decently merited. It is a fact nearly all those present have accompanied any changes to commercial practices.

Proprietary distribution can ill afford to serve the isolated valleys, their inhabitants, and the city, and the small plants because of convenient location, thus keep such farms in the market, and such markets in the city.

This was done, this long ago was the practice of many proprietary dealers to as wide an extent, I think, as was possible or justified to them. But that practice and the result of it is within the terms of the Act and is comprehended by the factor which we claim the Secretary must reflect in his final price to producers.

As a proprietary instrument moves out in sections of New England, cooperative instruments have moved in. The farmer owned cooperative moved in, and serves the country, the city, and the public at a surprisingly large
1090 capital outlay of producers' money as I shall attempt to show in this record.

The producers of New England have been their own salvation in that respect, and are also insurers today of an economical and adequate supply for Boston. It was rather a healthful although slightly indigent group which Uncle

Sam found here when he came to Massachusetts Bay to encourage and foster cooperative enterprise. Milk supply for this market is from farms which produce the feed of their dairy cows. The size of the farm and the fertility controls the size of the herd and the volume of its production.

Seasonal fluctuation of that production is influenced by the relationship of grazing areas and tillage areas in the several farms.

The supply and its fluctuations are affected and determined by the purely natural factors which are at once geographic and economic and social in character.

This milk shed is an area of true farms, homes, and keep such cows and produces such milk as the land itself will keep and produce.

The continued operation of each of these farms is dependent upon the insurance of a market which is essential to the economic welfare of all of them, and we submit, 1091 is in the better interests.

The difference and character of the source of supply serves and so served comprehend six of the eight factors which the Secretary must find reflected in the price resulting from his action taken upon this record and expressed in whatever order may issue.

The Presiding Officer: Will you speak a little louder, Mr. Thompson. I don't believe every one is hearing what you are saying.

The Witness: I said that I didn't intend, and I do not in any sense of the word impeach the motive or proprietary distributors, but of the form of distribution must and certainly should have its profit. It cannot use the milk it handled for capital. Its objective is limited to the consecration of its capital to the returns it may earn thereon. It may not extend that objective, and any such violation of its trust would result in a certain dissolution.

When it could have a buyers' profit before handling, it had such return for a limited service performed to the market similar in character to which the cooperative organizations now perform, but it cannot no longer have buyers' profits. It must be what the law says it must be. Its only

source of profits lies between that price and the price
 1092 it can sell for, and again, that price is now fixed by an
 agency of the government. In this situation, every
 spark of efficiency must be employed in the interest of
 economy, the changes in commercial practices not only are
 made, but are unavoidable.

Many of these changes have been the closing of some coun-
 try station, discontinuance of deliveries from a sufficient
 number of widely separated producers, cancellation of or-
 ders from some small cooperatives, with the expectation of
 returning whenever required, careful adjustment of sur-
 face, and the needs of each handlers particular market for
 manufacturing products, adjustments, and keeping the hand-
 ling and manufacturing equipment in delicate balance with
 profitable sales of Class I and Class II milk, selection of
 producers sources, service, selected location of centralized
 stations for receiving milk in the country.

These are a few, perhaps there are many more. They
 are all—in fact, each one of them is soundly justified by a
 current economic condition in this area. They are justified
 from the point of view of proprietary distribution, and they
 are efficiently promotional of its objectives. They are not
 promotional, however, of all of the objectives, factors to be
 reflected by the administration of the act, nor of the
 1093 public interests in economic adequate supply as com-
 prehended by the Act nor producer interests in the
 security of his market, his living, and his farm.

Confronted with conditions which warrant these changes,
 producers have set up defenses in the form of farmer owned
 cooperatives, handling plants so located in the country as to
 serve all producers desiring to be served, serving the
 public interests by unusual and adequate supply of whole-
 some milk at all times including emergencies, and serve a
 proprietary distribution by enabling it to further adjust its
 due to aid procurements, and does it to aid needs of both
 classes of milk price in this market.

The farmer owns cooperating plants in the country fol-
 lowed, and was an additional phase of cooperative enter-
 prise, following the establishment of sound and efficient

bargaining cooperatives in this area. The bargaining co-ops efficiently protect the producer and the market in that it is able by its various activities, by its loyal support of its members to influence not only producer price but some level short of actual handling of production, market supply, in other words—the farmer owned cooperative operating plants supply the balance of the needs, and I may say figuratively, in this territory which may be likened to 1094 a great dam extending across the contours of this highly diverse terrain, and holding behind it a reservoir from which can be drawn out willing supplies of this market at a reasonable price without reference to contracts, plans, or otherwise with facilities for taking care of what is left in the pond from day to day, regardless of that daily demand of this market.

Now, the capital investment of these farmers to provide this market service is very substantial. It may be set in opposition to the steps of any monetary value, and this service, however great it is, however great the expense, it is maintained, and it has no such value to be paid for because it is not adjusted to demand. We submit that it is a changeable value because of the demand and because the demand cannot be adjusted to any natural supply.

We do not think anybody will quarrel with the assertion that a milk supply depends wholly on natural factors and cannot be controlled from day to day. The market demand which is known and felt, and understood by producer defined by the quantity of milk the dealers are selling, to receive, plus so much of the quantity left in the producers' hands or can be disposed by other cooperative organizations and Class I milk. The total, no doubt, is the consumer demand of the market from day to day. 1095

Now, the variables which may be the character of that demand and the resulting effect on the farmers' continuing market and pay check are not so apparent on the farm nor in the city.

The demand of dealers for fluid milk is also highly variable, and it is not synchronized, that volume of production over the period of the calendar year. It cannot be.

The dealers' demand is strictly within his absolute con-

trol. It is defined by his ability to sell, and his willingness to expand his facilities and supplies to balance his ability to sell.

The volume of production, however, is entirely without the control of men. Cows have very little understanding of economic planning. The sun shines, it rains, the grass grows or dries up, without regard of dealers' sales or any man's willingness to do otherwise. The farmers' Cooperative milk plant must and does take all the milk produced by its members be the same more or less, and supplies it to dealers from day to day, more or less, take it or leave it, as they please.

Because dealers are well served by a well balanced quantity received directly from producers, the quantity they buy at times, the frequency of their taking, and the periods during which they are partly supplied by farmer owned cooperative plants shows clearly the extent to which the cooperatives render the market service for which the payment is desired.

The great volume of milk during a short season is largely left in the producers' hands to be disposed of by his own plants. It must be disposed of or lost, and if it is lost, the producer has lost his farm, his production, the city supply is so curtailed during some months of the year his price of bottling milk would make the consumer also worry on the market service and protection which is being provided for by farmer owned cooperative plants.

In that connection, it may be said, and I think it can be defended that the cooperative protection to the consumer and to the producer who is a member of the cooperative organization owning a plant, and the cooperative organization bargaining includes also the non-member producer. It has already appeared in this record that in the furtherance of proprietary distribution the limited objective which

I have just described, there is a natural and necessary practice of selection of producers and these non-members who are in a select and preferred position like the witness on the stand last evening who said their group had a preferred market, a selected market, that they

found it in their interest to uphold the order, otherwise they would have to pay for all Class I milk.

It is perfectly true, it is perfectly sound position to take, but it is illustrative of the situation which exists here as to proprietary distribution purchases directly from the producer, and it is also illustrative of the necessity for a cushion of milk from somewhere, and if that cushion is required, then somebody to produce it, must be kept in the business throughout the time his production will be in Class II.

The cooperative plants carry the burden of large surpluses most of the year, and must do so if the supply is to be adequate, for the short season emergency. The cooperative employs the philosophy that the surplus should remain in the country.

They must own equipment for manufacturing all products of Class II milk in order that the producer may have a sure and staple price in all seasons. As in such manufacture,

however, the cooperative plant can be outlined as a 1098 uniform pattern of the marketing of its Class II milk over the year as can be done, and must be done by the proprietary dealer who can control his supply, thus gaining better prices from the buyers.

From this surplus, the cooperative plant must and does stand ready at all times and does supply dealers with actual needs of Class I milk so that large volumes are not available to farmer-owned plants and their sales are largely spotty, and many of them at buyers prices.

The committee obtained a great deal of detailed information from the records of operating cooperatives, most of which was confidential. Many facts appear from the transcript of the records received which tend to prove the market conditions of supply and demand methods of marketing and cooperative service and protection to the market inclusive of all the elements, factors, which must be reflected in this price, were found and should appear in this record.

For example, we found that the combined manufacturing operations of eighteen cooperative plants in this milk shed in November, 1939, separated 1,729,000 pounds of milk. In June of 1940, they separated 10,100,000 plus, and the

1099 other operations in November was seventeen per cent. of their operations in June. This is Class II milk; all of it. In November, 1940, these plants made into soft cheese 264.4 thousand pounds of soft cheese.

In June, 1940, they manufactured some surplus on their hands 1,998,000 pounds of soft cheese. That is almost two million pounds. In November, they operated their facilities at 13.22 per cent. of their surplus manufacturing operations in June. The powder in November, there was 12,000 pounds, made from the surplus, whereas in June, 257 plus a thousand pounds were made.

In November equipment operations was 4.69 per cent. of what it is necessary to take care of the seasonal fluctuation, and the actual surplus left on hand when selected supply, the proprietary distribution is adequate due to the flush season.

The point is this, equipment must be owned and must be to a marked extent idle, and in some degree always.

The same proportion follows with respect to dry casein where the equipment was employed in November 3 percent of its other requirements, and with respect to cheese none

at all was made in November, whereas, 189,000

1100 pounds were made in these plants in June. They

have equipped all of them. They own it and stand the interest and the depreciation for the handling of this milk, and the protection of the fellow who makes it available for this marketing protects him a reasonable price, and they do it to some extent.

We found these eighteen plants could handle from fifty to seventy-five per cent. more in emergency—I say emergency, because that would involve operating about twenty hours, but it could be done, and with efficiency in case of need.

We found, also, the combined receipts and surplus with relationship to the pool, and this is a combination of only four associations treating the milk pooled as one hundred per cent. It shows the supply and the casual character of the demand upon this supply required to keep this market in reasonably priced milk.

The Administrator's pool is one hundred per cent. These four cooperatives received milk produced in November, 1939, thirty-seven per cent. of the milk pooled. They sold thirty-six per cent. of it in November, of the milk pooled, and they carried forty-three per cent. of the pooled surplus;

but, in June, with thirty-nine per cent. of the receipt, 1101 they sold only twenty three per cent. of the pooled milk sales. There was no cushion. It wasn't required, naturally, in the flush season, and they carried forty-seven per cent. of the flush pool. The excess of November sales over June sales might be said to throw some light on the volume of market protection.

If it does, that item with respect to the four cooperatives, exceed still more pounds, and that is the sizable milk plant. It appeared in Northern New England, amounts to at least the production of 12 to 1500 dairymen, farmers out of the market.

I stated sometime back it costs these producers something to furnish this protection, and among other things it costs money just to own these facilities. We find, also that the composite investment—I have forgotten exactly how many plants, I think this covers about 44 cooperatively owned—land, plants and equipment for receiving fluid milk, 44 station cooperative owned located so as to serve all producers—

Mr. Durbin: Could I interrupt?

Mr. Thompson: Yes, sir.

Mr. Durbin: None of these plants that you speak of were duplicate plants which were put in yesterday? In other words,—

1102 Mr. Thompson: They include those same plants, yes, and others.

To continue, the land, plants and equipment for receiving and shipping fluid milk to the market, owned by farmers cooperatively, operated at forty-four stations located so as to serve all producers, have invested \$1,440,315.00 of farmers' money. Land, plants, and equipment to convert into cream, butter, cheese, soft cheese, condensed milk, casein, and powder for the handling of surplus milk, Class

II, if you please, amounts to \$1,111,491.00 a total producers investment in this market, protection of \$2,251,806.

Without reference to operations and expense of operations, just with reference to what it costs farmers to own these facilities, we found, I think it must be a matter of opinion, and yet, it is our opinion in discussing the matter with operators that a fair average life of this equipment is around seven years, taking into consideration not only wear and tear, but improvements, which hasten obsolescence. On that basis, the depreciation item on the investment in Class II facilities alone, that is, \$1,111,000 plus would be \$166,723.00 per year. Now, this investment is made by producers, and I want to emphasize in this record it is 1103 made in a non-profit enterprise, and there is, there-

fore, no source from which to amortize that investment. Therefore, compound interest over the life of the equipment is not only pertinent, but is a proper item of actual expense or cost as distinguished from delayed expense, to be considered, compound interest on this investment on Class II facilities would amount of the life of the equipment to \$559,780.00, which is, in fact, over that period, \$79,000.000 plus per year, making in the whole a tax for depreciation and interest, a non-profit enterprise furnish the protection it does furnish to the market, \$246,992.00.

By the way, giving November, 1939, the volume handled by these plants was done at a cost of nine cents a hundred-weight.

Now, let us see how this cushion works. We found, and we believe these figures which I shall now put into the record illustrates that. A combined number of different handler customers taking milk from forty of the cooperative plants, the operating cooperatives for the year ending August 31, 1940, runs something like this:

In September of last year, there were one hundred forty-two; in October, one hundred forty-eight, in November, one hundred ninety-two, which is the high for the 1104 year. It went down to one hundred thirty-six in December, one hundred twenty-one in January, one

hundred thirteen in February, fell to ninety-four in March, eighty-three in April, eighty-one in May, and the low was seventy-five in July, it would appear fortunate that there was a supply available, because that demand increase precipitantly to 171 in July, and carried through August at 160.

Now, the average over the twelve months would be interesting, and it is, in fact, 126.3. The monthly average, however, for the production season is 158.16, while the average for the season of the increasing and flush periods of production is ninety-four, and that is the character, in general of the action which cooperative enterprise with its investment in the country maintains for the production of its market, making it unnecessary that that production be furnished as a high milk price to consumers.

We found that the combined outlets of forty cooperative plants from regular to casual day periods of time during that year ending August 31, 1940, showed this:

That the different handlers purchasing from those plants during the whole year, taking a regular supply for the whole year, is twenty-eight.

1105 Those taking supply regularly for a period of eight to eleven months was twenty-two.

The same during a period of four to seven months, twenty-one.

Over two to three months, twenty-nine.

These are different, not inclusive, but for a period of one month or less which were submitted includes hot seasons, hot periods, waves, and the period of short milk, 257. The total of the one to two month customers is 286, over a thousand per cent. of the regular year round class, and it is 71 per cent. of that class or period from four to eleven months. The farmer owned plants are obviously protecting the last three classes, that is, 307, against all seasonal fluctuation production. This number alone is 86 per cent. of the total purchase.

The Act provides a rule by which the Secretary of Agriculture shall prescribe the terms of the order, when the secretary fixes a minimum price for milk. He is required, to find, first, in that price, what prices will give milk a parity

purchasing power. The Act further provides what expansion of the parity price rule by the directing that the level of such prices shall be determined by reference to 1106 the price and supply of feeds, and I quote now from the Act:

"And other economic conditions which affect market supply and demand.")

Bearing in mind the Act confirms such implied expansion of the parity rule by prescribing a control other than the parity rule for demanding price levels to be fixed. The factors specified which the secretary, and I quote again:

"Shall reflect in the price structure he may prescribe as the price of feeds, supplies of needs, and other economic differences which affect market supply and demand." For milk, and,

"In the public interests."

These several specific factors cannot be reconciled upon any other basis than the assumption of the policy and direction there expressed, comprehend not only a supply but a supply at a reasonable price to the public.

It is mandatory that the secretary shall fix such prices as will reflect these specific factors.

Congress, using "reflect" here seems to bring back and secure such economic differences as will secure volume of production equal at all times to the demand of the 1107 market at a reasonable price. It cannot be assumed that in the face of these provisions that Congress intended the Secretary to secure the supply by price alone. Had it been so intended, there would be no need for the Act to order the inclusion of the factors other than the parity rule.

The inclusion of these factors of itself indicates that the security of the "supply a sufficient quantity of pure and wholesome milk." In words of the Act, the availability of such a supply at a price to be reasonable in view of current economic conditions, is a matter of first importance, and is controlled by the Secretary in the event that simple sum,

equal to parity, is not reasonable, and because not effective to provide security of adequate supply under the current conditions.

An adequate supply of milk is not procurable, is not susceptible to such temporary volume control as would make it answerable within the terms of the Act, and the sharp variation in demand which occur at the time, impossible to foresee, a burden of the surplus of milk as resulted during the large part of the year from a milk shed with a capacity equal to the requirements of the market at all times of the year.

I think I stated that as a fact, and I think it cannot
1108 be overestimated, because the Supreme Court of the United States found the following facts with respect to that in the Rock Royal case, when they said:

"The chief cause of fluctuating cost and supply is the existing surplus which is necessary to furnish an adequate amount for peak periods of consumption. It must move into cream, powder, butter, and more or less non-perishable products, which are in competition far removed from the metropolitan centers."

I think that is established by the Court of Last Resort as a fact with respect to the characteristics of a milk supply. And it will perhaps be pertinent to suggest that farmer owned cooperatives have provided here at their own plants the facilities to dispose of those products found to be necessary for disposal.

To secure the availability of that service all the time in answer to market demand, some instrument must be present functioning and equal to the job. In this market it provides that the farmer himself has much more than the burden by means of his cooperative plan. We have shown the importance and territorial expense of his cooperative enterprise.

1109 This enterprise is here, performing a service which makes possible control of this market, of this order, and we now submit it as clear from the record that it is a valuable service, and that for economical reasons it cannot be performed within the purposes and policies of the Act

by the proprietary distribution, and I think that statement can be defended.

We submit provisions for payments of these services in the process of demanding the price is justified by the Act, and the existing economic conditions which affects the supply and determining in this market. We submit it is within the public interest and is within the power of the Secretary and should be provided by him in view of this record in order to reflect all of the factors specified in the Act which he is directed to reflect.

Congress must have had in mind that cooperative associations were a potential force to be utilized by the Secretary in effectuating its policies and purposes, because it provided the Agricultural Adjustment Act, and I quote:

"The Secretary shall accord such recognition and encouragement to producer owned and producer controlled cooperative associations as will be in harmony with the 1110 policy set forth in the existing Act of Congress."

And I submit further and most specifically construing the reason for that enactment comes this one:

"And as will tend to permit efficient methods of marketing distribution," and if you can do that without employing cooperative enterprise as agency for instrumentation in some measure for the purpose.

The Secretary may not encourage any one, encouraged under the terms laid down by Congress but he may use cooperative agencies "to promote efficient methods of marketing."

We are asking him to do so by the proposed amendment to Order No. 4.

I would like to ask Mr. Davis to testify with respect to this proposal as it relates itself to bargaining and cooperative.

Mr. Merrill: Will Mr. Thompson be available later to answer questions?

The Witness: Now, if you like.

The Presiding Officer: Do you prefer to ask the questions now?

The Witness: That is all right.

Questions by Mr. Merrill:

Q. Judge Thompson, you spoke of the service of 1111 the operating co-op in maintaining an adequate supply of milk for the market. Is it your contention that if this proposal is not adopted as an amendment to the order that there will not be an adequate supply of milk to the market?

A. That is sort of—I think this: That unless some of what is probably within some part of the cost of furnishing this protection are not provided, but there will be a gradual weakening of cooperative enterprise in this milk shed to the extent that in that same degree there will come back former practices which immediately with this order in the market and proprietary distribution bound by fixed prices on both ends, will leave a lot of farms now producing out of a market and soon out of business.

Q. Do you maintain—

A. Pardon me, to that extent the supply available to this market will be affected.

Q. Is it your position that there has been a tendency toward the weakening of cooperatives since the establishment of the Federal Order?

A. No, I would not say so. I don't know that that is so.

Q. That tendency has not already set in, then?

A. No, we are not trying to save a dead dog. We are seeing before us and feel now that the time is now—that there is a demand. That has been included in some 1112 of the expenses of maintaining these farmer owned co-ops by way of allowances which proprietary distribution has also received may possibly be said to be some part of these services, and they now appear in this record; at least, one small cooperative has been taking it out of its members in order to survive. That does not mean they are a dead dog. Mr. Carpenter says they are not, that their co-operative association is worth continuing and will be

continued but, the point is that it is a non-profit thing, and there is no place to take it from except the milk.

Q. You didn't hear Mr. Walker's testimony at Montpelier on Monday?

A. No, I didn't.

Q. Is there any reason to believe that conditions would be any more difficult for the operating cooperatives in years to come than they have been in the past three or four years under the order?

A. Not if—not if allowances within its control are made equal to the cost of this service in whatever form the allowances are specified.

Q. Apart from allowances, so far as the operations are concerned, is there any reason to believe conditions will become more difficult than they have been?

A. I have no way of knowing.

Q. Of course, not all cooperatives would be in the same position; that is true, isn't it?

A. With respect to what?

Q. With respect to difficulty of surviving?

A. I don't know about that. I am not sure of it. I believe there is so much which is common to everyone of them by way of fundamentals that any practice authorized and established by law which will weaken or adversely affect one of them would eventually affect to destroy any one or all.

Q. You know, don't you, there are some operating cooperatives that continually pay more than the blended price to their members?

A. Oh, yes, I suppose there are.

Q. That is true of your own, isn't it?

A. Sometimes it is true.

Q. Hasn't it been true continually for the last three years?

A. I am not sure about that, but probably it has been.

Q. Would you be willing to introduce into the record prices paid by Bellows Falls for the past three years?

A. Yes, I would. However, I would like to be saved the trouble. I will agree that the confidential figures may be

submitted to the Secretary for this record, how much we paid our producers.

Q. Do you consider your price to producers as confidential information?

A. I think they are so considered by the Administrator.

Q. I understand you will agree that the Administrator may be permitted to introduce those prices?

A. That is right.

Q. May I ask if the Administrator would be willing to make that information available for the record?

The Presiding Officer: He is not here.

Mr. Merrill: Is there anyone in the Dairy Division authorized to speak for him.

The Witness: I have the information here so I could put it in.

Mr. Miller: We see no objection offering it for the Market Administrator.

The Witness: From my point of view, they may be furnished to the Secretary here.

Mr. Merrill: Thank you.

The Witness: At the same time, I would like the record to appear that the contents is not pertinent to the issue, but we have no objection.

Questions by Mr. Merrill:

Q. Do you know of other cooperatives that have paid during the past three years part or all of the time prices in excess of blended prices announced by the Administrator?

A. I don't know. My only knowledge for this was obtained in this information. However, I would like to say right here I hope they did, because if they could not, their reason for being might possibly be questioned. There cannot be cooperatives, farmers cooperatives, unless it can return some benefit. If he has to take to the platform and leave his cans of milk every morning—

The Presiding Officer: Have you finished, Mr. Merrill?
Mr. Merrill: No.

Questions by Mr. Merrill:

Q. You don't consider that a profit, however?

A. I don't know whether you do or not. I don't think so. We don't do our business that way. If you talk about what we paid, we didn't pay anything, in terms of purchase and sale. The last of the month, we find out how much we have and how much it needs to operate the place, to keep it going, and the rest of it we split among the membership, based on the milk delivered.

Q. In other words, your position is that the cooperative should receive these payments, and they should be able to return to their members prices in excess of the blended price announced?

A. No, I don't. I said I hoped they could do so. I don't say they should receive the service payment for that purpose. I have thought that we asked for the payment of services we performed, first because organizations like ours cannot do it without violating your trust to your stockholders; and, secondly, in order that we may reflect in our return a quantity in money equal to what the milk actually earns without being told what is to be done by these producers to provide the market protection.

Q. You speak of cooperatives maintaining emergency supplies for the market?

A. Yes.

Q. Are you familiar with any emergency conditions during the past five years or so?

A. No doubt I have been with many, but I will cite one which was most unusual change in the weather last summer. And I think not only our plant but everybody's plant was almost dry of fluid milk, and that week or ten days had we had any long term contracts for Class II product, undoubtedly we would have had to make a choice between supplying proprietary dealers with emergency milk, or violating our contracts for manufactured products. That is illustrative of what I have to say about that situation.

Q. That was a service to these dealers, was it not?

A. I think it was, and through them to the market.

Q. In what way to the market?

A. Supplying of milk in it, I expect.

Q. Was it the service to the non-members in shipping to these dealers?

A. Yes.

Q. In what respect?

A. Because it protected their market with a supply which their buyer, according to the testimony here yesterday, does not take regularly, and I think, does not take for perfectly justifiable reasons.

Q. You are aware, of course, by virtue of the order, those producers participate in all of the fluid milk sales in the market regardless of their source?

A. Oh, yes, of course. Under protest by them, it now appears.

Q. So that, if the operating cooperatives could not supply that milk but if it had come via some other distributional channel, the non-member producer would have enjoyed the same sales in the blended price?

A. Yes, I admit, Mr. Merrill, but I don't approve that hypothesis, because we are claiming here without this protection of some kind, it would not come from anywhere and somebody would have been scrambling at the same price. I believe the fixed price or minimum in the market for bottled milk, in other words, that would have supplied the market without the philosophy of the Act by price alone.

Q. You are aware, are you not, the emergency situations during the past five years when dealers have had to buy milk from outside milk sheds at a premium?

A. No, I personally have no knowledge of that. I believe it if you say so.

Q. You don't know dealers have ever charged, have charged the consumers an extra price because of the premium they had to pay for emergency supplies?

A. No, I don't know, and I don't intend to imply any such statement in anything I said. But, I did say and I do say now that sort of condition existed in the market.

anywhere by natural prices eventually result in higher price.

Q. You are not aware any of these situations a deduction was made from producers because of the premium dealers have had to pay?

A. I don't know of any such occasion, no.

Q. Now, with respect to your testimony concerning the service offered by the operating cooperatives in providing receiving stations for producers in areas which proprietary dealers were unwilling to supply. Can you name any specific area in New England where that is true?

A. No, I cannot, Mr. Merrill. If there is any disagreeable implication by using my word "unwilling", I am quite willing to change it and say unable.

Q. Can you name any geographic area in the milk shed where cooperatives, proprietary handlers are unable
1119 to survive?

A. Not within my personal knowledge, no. I am not acquainted with that situation to have a personal knowledge of it. I say that I am not familiar with, I would say uninformed in respect to details.

Q. You are familiar with the conditions in the State of Vermont, aren't you?

A. Only to the extent I have just stated.

Q. You spoke of the service of bargaining cooperatives in two respects, in influencing producer prices and influencing the market supply. In what way do bargaining cooperatives at the present time influence the base producer prices?

A. Well, Mr. Davis knows more about that than I do. From my observation, I would say that every force has been a stabilizing influence, and it is stabilizing with respect to fair producer price, is an inducement to that production, then, they have performed it. That, however, is an opinion perhaps not too wide observation.

Q. Do you know of any members of bargaining cooperatives that during the past three years have received more than the blended price?

A. I don't know what they receive.

Q. In what respect? Do you care to answer this?

A. Again by means of hearsay. I am informed they
1120 have, but I don't know the facts.

Q. Do you care to say in what respect a bargaining cooperative influences the market supply?

A. Only in the way I take it, the way I just stated.

Q. That is, through price?

A. If they influence stability, reasonable prices to producers, I think it might receive—the supply would be likewise stabilized to the extent of the influence.

Q. You don't mean to say they allocate producers to different stations or outlets?

A. I don't know about that practice. Mr. Davis knows all about that.

Q. You testified as to the investment of operating cooperatives in facilities for handling surplus milk. Is it your position all of this surplus milk was handled at a loss?

A. I don't know about that, because we had no such information, we didn't ask for it, and I have no knowledge of it. I don't know how you will begin to compute the loss. In the expense of maintaining country facilities, I am frank to confess I don't know just where proper charges should be broken down and charged to service, market service, due to current conditions, and where there would be likewise essential to a profit organization pursuing its objective.

Q. Might it be true the proceeds derived from the handling of surplus milk have enabled the operating co-
1121 operatives or have made it possible for these operating cooperatives which have paid in excess of the blended price to make that premium payment?

A. I don't know, but I doubt it very much. From observation, information, with respect to our own operations I doubt it.

Q. Are your own surplus operations carried on at a loss with respect to the Class II prices established under the order?

A. I don't know about that. I have an idea; however, they are just about breaking even. When I say I don't know, I mean I have never seen a profit and loss statement

that attempted to separate. I doubt, however, if they more than break even.

Q. Is it your belief the return derived from your own surplus is about equal in value per hundredweight of milk to the just Class II price; is it?

A. I should say so. I hope so, anyway.

Q. It may be more?

A. What is that?

Q. It may be more?

A. I said I don't know about that. I have never seen, attempted to check-up a separate—

Q. One of your statistics, I don't quite understand, Judge Thompson. After testifying as to the variation in the proportion of sales in the pool by the operating cooperatives between June and November, you mentioned the figure of five million pounds, which I understood you to say, was the excess of November Class I over June Class I for that group.

A. I said that in connection with the relation of operations of four associations in this shed to the pool in November, and the difference between that and the same situation in June, 1940, the difference in those sales based on the pool, I said, would exceed five million pounds which we thought was illustrative to some extent of the market protection provided on the assumption it would have been taken in November at the market not required, and would have been taken in June at the market still required.

Q. Bellows Falls received milk from non-member producers?

A. I don't know whether we now do or not. We can and we were.

Q. Are any dues deducted from members of the Bellows Falls Cooperative?

A. We have never taken any dues, no, not in that form. We have always taken out of the milk what it costs regardless of the cost that might be broken down and allocated.

Q. Does Bellows Falls supply dealers in the Boston Market other than the group of stores?

A. Yes.

1123 Q. Does the sales of Bellows Falls to those dealers follow to a great extent the sales for the cooperative group as a whole?

A. Yes, they do. They have the same pattern.

Q. Does Bellows Falls supply dealers in Providence?

A. Yes.

Q. Does the benefit of those sales go to the Boston pool?

A. To the what?

Q. To the Boston Pool?

A. No, Providence is not included in any Bellows Falls figures going into this, its report. We supply everybody with this information, illustrating what I mean, such outside sales as are pooled, here include a quart a day to each one of our men, the pool has lost.

Q. If Bellows Falls does receive milk from non-member producers, are they paid the same price as the members?

A. They would be.

Mr. Merrill: That is right, thank you.

The Presiding Officer: Are there further questions?

Member of Audience: Do you think the Bellows Falls and other operating cooperatives have a tendency by their sales in the Boston Market to increase or decrease the net return to producers over the past ten or fifteen years?

1124 The Witness: That is rather difficult, Ell, but if I understand you correctly, I think the tendency has been one of strong support, and perhaps indicates—

Questions by Judge O'Brien:

Q. Judge Thompson, for sales of milk made to dealers in the Boston market as you testified, do you receive the pay in any case on composite basis?

A. Do we what?

Q. Receive the pay in any case on a composite price?

A. We keep whatever the fixed price in the order is, depending on Class I, or Class II milk, and we have paid ourselves the Class I for some of it, and we get Class II for—but that was in spite of us.

Q. I say, for Class I, do you sell that to dealers in a Class

I price and receive and pay the farmer a composite price?
Do you charge—

A. We have the license for Class I?

Q. What is that?

A. Order price for Class I. We sell to dealers.

Questions by Mr. Forest:

Q. Do proprietary handlers customarily go to other proprietary handlers for whatever supply of milk they want?

A. I don't know about that. I know that they frequently, likewise casually call on us.

Q. Do you know?

A. To illustrate. I know of one case which I think is the highth of that form of supply, where, in the emergency which Mr. Merrill asked about recently, a cooperative operating as a plant was able and did, I am informed, that some stray supply on an hour's notice a large part of a carload to a proprietary dealer contributing this to his cushion and through him, to this market. That is no fault of his, but it is an incident during which cooperative enterprise serves.

Q. What is the customary source of proprietary handlers for milk in this market?

A. What do you mean by that?

Q. If they happen to run from day to day, or season, what is the customary source of that supply?

A. The committee found that they call first upon the operating coop, and it would also appear largely they get it.

Q. Do the cooperatives, operating coops get any premium for that milk supplied on short notice from day to day?

A. So far as I know, I know ours does not.

Q. Do you think that would be a necessary condition for a coop payment that should be supplied to the market at the Class I price without a premium?

A. Yes, I think I do. I think that could be done. Perhaps not from a profit point of view, and not from the point of view in our holding the philosophy scarcity justifies high prices. Perhaps I better not say

justify, but results in high prices, but from the point of view of this Act and this market set-up and the reason for all co-ops, I don't think they should have a premium.

If the Hood Company were in the hole at ten o'clock in the morning, and called us at one o'clock, I see no real justification for soaking, for a premium for what we could let them have.

Q. Do the operating cooperatives ever contract for their surplus milk, long term contract for any surplus milk they might have?

A. Manufacturing products, do you mean?

Q. Yes.

A. I have not. I think our information justifies that statement.

Q. Would not it be another necessary condition the co-operatives would have in such contract if the milk would have to be available at all times? Would it not necessarily follow there could be no such long term contract?

A. It does. I so stated. That was my intention.

Q. Are there cooperatives—do the coöperatives nominally follow the practice of guaranteeing the market to all their producers?

A. Yes, they do.

1127 Q. Do you have the same practice among the proprietary handlers?

A. What is that?

Q. Do you have the same practice of guaranteeing a market to their producers?

A. I don't know about that.

Q. Do any of the operating cooperatives ever refuse to take on milk which is in the country?

A. As far as I know, they do not, because, assuming the milk is qualified, I don't mean by that—I haven't the knowledge with respect to the whole territory in every case but I believe that they do not refuse.

Q. Would not that be another necessary condition, such a payment of the cooperative association, if they would at all times accept milk offered without a market?

A. Yes, it is, and if I didn't cover that, I will say now, our information this summer, working on this problem

disclosed, and I stated as my opinion from the information that we received, that it is a fair and well supported opinion that the cooperatives as existing today could take on not less than fifty per cent. more and are and have been always ready and willing to do it.

Q. You cited some figures on the amount of dry skim milk made, casein made by this operating cooperative.

1128 Don't some of the proprietary handlers have that same experience in the seasonality of their supplies?

A. I don't see why not. They must. The difference, however—there is a substantial difference because that handler, as I stated, can't control his supply. He can't take on that volume of Class II milk which it is to his advantage to handle and sell advantageously, and he should do it. We are exactly in the position as I also stated with respect to being able to fill a demand which might be attractive because we cannot control the pattern of our sales and manufactured products, and we want to stand ready to supply fluid milk.

I am not trying to represent that our motives in that respect are entirely benevolent. They are in the interest of our members that could not exist and function, in the interest of our members in either practice or policy, an intention to do otherwise than sell fluid milk at every opportunity.

Q. One other small point. You stated if you received from non-members, you would pay them the same price as the members, assuming you paid at least the blended price?

A. What is that?

Q. That is, assuming you pay at least the same, the Administrator's announced blended price?

A. That is not assuming anything if we take that milk. We would take it on under our regular practices, and
1129 we would not get in Dutch with the Internal Revenue Department, where we would not be exempt from taxes.

Q. How could you pay a non-member under the market Administrator's announced blended price?

A. We probably would not. If we had to, we would. We would have that kind of contract with him, necessarily.

The Presiding Officer: Are there further questions?

Mr. Bronson: Yes, sir.

Questions by Mr. Bronson:

Q. One question on the manner of the figures covering the forty-four cooperative plants to provide outlets under different handlers. Do you want to testify as to what operator that was?

A. No. In these figures I think that is not necessary, not relevant. It does not matter who they are nor what they are. We made no promises to those from whom we got this information, and we think they have a right to understand this was confidential.

Q. Will you specify as to whether the customers were located in marketing areas covered in Order No. 4?

A. Yes, they were.

Q. Or outside?

A. They were.

Q. All of them inside?

1130 A. All in this pool.

Q. That is a different story. That is a different question than the one I asked. I asked about the marketing area.

A. I think that is also true, but I am not sure about that. What I meant by not being sure is, our information wasn't in that specific form, that all was pooled.

Q. With respect to the twenty-five customers that were furnished for one month or less, were they located in the Boston Marketing Area, or outside, and whether or not with reference to supplying the marketing area, to the Boston area, and whether it was secondary markets, doing business in other markets?

A. In response to that, it is with respect to the Boston marketing area.

Q. Was the United Farmers one of the members of that committee, represented?

A. I said Mr. Selby, Mr. Davis, Dr. Baneroft, and myself, comprise the committee.

Q. Did you check with Mr. Selby whether he had any operating contract to furnish supplies the year round?

A. What is that? I didn't get that.

Q. Coming back to the question in regard to contract, operating co-op might have, and your statement that you doubt whether any other handler—did you check with 1131 Mr. Selby, if he had one?

A. No, and I didn't intend by my reply to Mr. Forest's questions to say there wasn't one. I said—

The Presiding Officer: Are there further questions of Mr. Thompson?

Questions by Mr. Durbin:

Q. Assuming that your proposals should be adopted, are you prepared to spell out at this time any of the standards which should be used by the Secretary in determining what cooperative should receive these papers?

A. No, I am not prepared to do that. I should be glad to be heard on that if the Secretary comes to a definition of those requirements. I think I may say that, in so far as our committee contemplated that subject matter when we made this request for amendment, I think you call it 3, we were thinking of terms of what is being done in the New York order, or under it, but I am not prepared to say that now.

Questions by Mr. Miller:

Q. I would like to ask Judge Thompson if he considers that the cooperatives under existing arrangements are failing to receive proper compensation for the carrying out of these functions that he has outlined as those inherent in the responsibility, in the very nature of the business of these cooperatives under the existing arrangements, 1132 do cooperatives fail to receive compensation which enable them to perform properly and to continue to perform these functions?

A. Do you mean by that under the terms of the order No. 4, as now in effect?

Q. Yes.

A. I think they do. The only knowledge I have of any exception is the testimony here yesterday. Generally speaking, I think probably we are as it is. The proposal, read

together with proposal 2, it may be noted reduces by half one allowance they are now enjoying. I don't mean by that I can justify an absolute allocation of that proportion of the current allowance to these factors.

It might be much more than that, but, if your question means whether or not we can stand it as it is, it is my opinion—that is, without trying to include someone else's opinion, knows more about it from experience—we probably can. I think so only because we do.

Q. I was—I thought it would be important for the record if you were to make your ideas quite clear as to why, as to what respect the present provisions are as adequate as they should be for the kind of functioning, kind of operations which you describe, undertaken by cooperatives of different types, and I would like to ask you to indicate a little more particularly if you care to why the present arrangements to which you refer as to the provisions for handling Class II milk, the allowances for handling Class II milk, are not as desirable or in what respect they fall short of taking care of the operations of the cooperatives so engaged?

A. I can't say any more than I have said. I think in the lump sum of allowances now provided, the expense, inclusive of these services, inclusive, generally speaking, has been, is being, and can be discharged. That, however, has been criticized as a proper charge for the particular service for which it is now allowed, which is manufacturing costs, handling costs of Class II.

It also has been criticised, and I assume the Secretary found some justification for the criticism from his point of view, that the whole expense of the market protection and service is upon those who give it. I include that in my premises because I can't make myself believe the Secretary of Agriculture of this nation established that rule in the New York order without finding that something was being done to merit it, and, so, it must be that experience has not yet dictated the specific factors which go together to make that service? I don't know anything about that. We are making a proposal here which is addressed in part to some of the criticism that the Class II allowances exceed

1134 the Class II necessary expenses. We don't know for sure whether that three cents is enough of an adjustment or not. It may be more. Experience will tell. We think it is fair to propose that in relationship of our proposal No. 2 and proposal No. 3.

Q. Then, I take it that you feel that your proposal would be a more proper manner of taking care of the expenses incident to the handling of reserve milk and making it available than the present method in the order for doing that, which, I presume, we all understand is part of Class II milk?

A. If it has no other merit, it will spell out what it is for correctly, and it is a reply to criticism, constructive or otherwise.

Q. As I understand it, it is a part of your statement of the case to assume that under the order as it is now the handling of Class II milk may or may not be handling it in the manner which you describe, and, therefore, incurring all the expenses incident to handling it as reserve milk?

A. I am sorry I don't understand that question exactly.

Q. Is it in line with your thought that the present Class II allowance which is the form in which compensation is given, for some, at least, of the operations which you discussed, that such a manner of taking care of the
1135 problems of compensating for such handling, and, therefore, securing it in the market in the present order, might be improved upon since, under the existing order, it gives compensation to certain classes of handlers handling Class II milk which do not, in fact, handle as cooperatives have come to handle it in this market?

A. That is another way of spelling out the distinction which separates market service from the physical cost of handling and manufacturing. And, I am trying to say we don't know just where that line of demarcation is.

We don't know just how justifiable, by what accounting method the criticism has been heard in the past, not unfortunately, is justified. I make no arguments with respect to that except as descriptive of a condition if—and we are now proposing this division of it, whatever each may be; and, perhaps, it would be discovered with a measure of some

experience. We started out with the New York established practice because it has been to some extent, at least, merited. We started there.

The Presiding Officer: Are there further questions?

Questions by Mr. Smith:

Q: In your testimony you came back again and again to the language in the Act, adequate supply of milk and public interests. In that connection for the insurance of 1136 adequate supply of milk, which do you consider as the more important, the net price the farmer receives for the produce or the particular operations that may be performed by cooperative plants in handling that milk?

A. Well, I don't know that I know exactly what you mean by that. I think it is possible that the true constructions you state are inseparable. I think the limitation upon the price he can receive must be up to inclusion and provision for whatever is properly embraced by the terms which I quoted, marketing conditions as they affect supply and demand.

Q: Well, in as much as that language in the Act is with reference to qualifications of parity purchasing power of milk that the Secretary should take into consideration in setting a price in relating country station operations to those particular things, namely, adequate supplies of milk, public interest, and so on.

Does not that seem to be a relation of one thing to part of the language of the Act which more specifically applies to something else?

A. I don't think it does apply to something else. I think the minimum price—I think within the terms of the Act the Secretary is at liberty to make such terms as will result in a greater price than the definite parity rule for a lesser price in the making of either one of them compre- 1137 hends and has the required reference and reflects all the other factors required.

Q. Do I understand that—

A. Whatever it takes to make that up and comply with the act we say is not only within his power, it is his duty.

Q. Do I understand that answer to mean if payments of this type were made a part of, and whether you would consider them a part of the price?

A. That is right, essentially so.

Q. You drew for us a beautiful picture, far-flung supply of milk from the northern part of Maine to Lake Champlain?

A. That is right.

Q. Connecticut, and so on.

I am not quite sure of this, whether there is some milk coming into Boston market from Connecticut?

A. I didn't—

Q. Only to the border of Connecticut?

A. It may. I don't know as it does, but I spoke about Connecticut in attempting generally bound the shed.

I don't know whether they do or not.

Q. In that connection, you also mentioned the area as being tremendously diversified, a diversified region.

A. Physical geography.

Q. Physical geography? You pointed out there
1138 were other milk markets, smaller milk markets, sometimes completely surrounded by markets, and you were attempting to draw the implication of the complicated nature of that whole picture in times of emergency, and the demands of those other markets might have a decided influence on the Boston supply?

A. No, I didn't have that in mind.

Q. Then, didn't these other markets—it does not make much difference?

A. It does only in the respect to which I referred to them. That it might be that the supply with respect to location and volume might be separated somewhat by the incidence of those islands as it is in the northern part of the milk shed, so separated, and its life of communion defined by the specification and the country.

Q. In describing the activities of cooperatives, you pointed out in some cases there were certain areas quite sparsely populated, and for other reasons isolated, where operating proprietary handlers had abandoned supplies and co-ops had come in and taken over the plants or set-up.

plants and assured those particular producers a market. In that activity it is one of the services the cooperatives in general are performing in the market?

A. I did put that in entirely for the reasons you apparently understand. What I did intend to imply was—
 1139 that situation by natural processes resulted in a bad spot for proprietary distribution to serve. I mean bad spot. It would not be an economy for them to try to serve. I think by the operation of natural, certain economic laws may well serve their objectives and they could not operate there.

Q. Do you consider these cooperative payments would be needed to help you to keep maintaining such isolated areas?

A. That is exactly what we are saying.

Q. Do you think that practice is something quite necessary for the maintaining of an adequate supply of milk for the market?

A. It is necessary, definitely so, if our concept of what this Act contemplates as being an adequate supply, is correct. That is, adequate supply at reasonable prices.

Q. In another place you refer to the Act as apparently encouraging efficient cooperative plant operation. Do you think that is necessary in maintaining an adequate supply?

A. Yes, I do in some form. We are attempting here to name the service as such.

Q. Might we not—

A. Have it paid for.

Q. Might we not—

A. It might be provided it was paid for under the guise of another name.

1140 Q. Might we not also have an adequate supply of milk for the market secured under an inefficient system?

A. Well, if it was inefficient economically, I think Doom's Day would be predictable.

Q. In reference to the proprietary handlers, you seemed to indicate that the particular part of the order which sets a uniform price for all producers prevents activities on the part of those handlers which is conducive to supplying market service; is that right?

A. I think it is quite obvious. I can go further and say that I think neither the city nor the country—by that I mean the consumer or the producer—has a right to expect any such service from proprietary distribution without some form of compensation other than it is possible for them to get between these two walls of legal control.

Q. Would that mean—

A. I say further and I did say in my testimony when the thing was on its own legs and without control that there was some method of buyers opportunity in order to pay for that service, not because anybody was trying to conceal money from somebody else, but because it could not have been had without compensation.

Q. Does that mean one of the factors of the order has prevented the proprietary handlers now from performing that type of the service if they wished to.

1141 A. That is another one of "licking your wife," question, too. I don't want to wise-crack you. I know you are serious about it.

I would not put it that way. Your question connotes an entirely different thing than we are asserting here. The incidence of this order and the legal wall on the other side, the proprietary distribution, as such, has to precipitate these changes, commercial changes, in practice which must necessarily come because of all of the characteristics of objective to which proprietary distribution is confined.

Q. Just one more question here. Coming back to the reference in the order to available supplies of feed, and so on, it has been pointed out that in the order is a qualification of the parity part of the order.

I take it from your testimony, then, that the fact that the parity concept is thus qualified plus the emphasis that you apparently place on it, results in a condition whereby it may not be desirable for the secretary to set the price as to the parity level at all times?

A. Well, the Act says that if it is reasonable, he may fix it; if it is not reasonable, I assume the necessary implication is that if he has reflected the other stated factors,

By Mr. Feddersen:

Q. Leaving with the Secretary the matter of defining the services, would you also leave to the Secretary the right of determining the economic structure of any particular aspects of the service?

A. It seems to me these two are inseparable. I don't see how—

Q. Service—

A. It is impossible to define it for him.

Q. (Continuing): the service, no matter how well—it may be uneconomic in relation to cost—

A. Yes, the measure of it. I think it is entirely within the jurisdiction of the Secretary. If he found to determine, if he assented—I am trying to decide he had a right to.

By Doctor Young:

Q. In your testimony, you mentioned one service, one type of service that the cooperative performs in maintaining a cushion of supply. Do I understand you to mean that is the reserve supply always necessary that the market
1145 must have to go and come on, to cover fluctuations, demand, and so forth?

A. I think so. Perhaps that cushion was a bad word, but that is what it amounts to. I think if I was in the milk business, or in the cotton business, or any other sort of business, and was able, from experience, to say that I probably could get along nine-tenths of the time on a unit of supply for a day, I would contact somewhere, if I could, for a supply if I needed eleven or twelve a week, a month, or three months.

That is what I mean by "cushion." If I didn't have it, I would have to buy those two or three or two hundred fifty units in order to protect my business, and I might—I would not like to do it. It might result in a loss which would eat into my certainly justified profit.

Q. That type of service could be quantitatively estimated?

A. I don't know whether that could be done any more. I am not enough of an expert to answer that one.

feed being one of them, he shall fix it at parity and reflect the other factors.

1142 Q. And these qualifications are such it is likely it would not come out at precisely parity all the time?

A. Parity. Well—

Q. Parity alone.

A. Parity alone, no. Right.

It seems to me that would be impossible changing—Congress had to mean something by the inclusion of those factors and my point of view is this:

When they come down through this thing and defend their parity rule, they must have realized they could not possibly comprehend either existing or changing economic conditions in marketing or in supply or demand.

Those factors have been included. Now, if they are taken together, they might be consistent with a flat and compounded parity price or quantity.

They might not.

Q. By "flat" do you mean raw milk?

A. No, no. Sum of money.

Q. Is that connection—

A. For example, there might be a market condition—I think there is one here where the character of the production, the supply adequately required a parity price on Class I,—that combination of conditions might intervene, practically destroy the parity price when it got back to the farmer, yet, he is making the supply, and the supply

1143 For some reason or other, perhaps naturally so, perhaps due to the character of this community, must be provided.

Q. In that connection, the order does not state parity price, but rather says parity purchasing power.

I would like to ask—

1144 A. That is the yardstick, isn't it?

Q. I would like to ask if one of the factors which should have an important bearing on the determination of parity purchasing power should be the quantity of milk produced above the market?

A. That is what the Act says.

Q. These pounds of milk the Cooperatives do, from time to time, furnish—

A. I think that can be measured, certainly. It appears—but, also, in that connection, I think it will be admitted that to have some quantity which history shows has been required, and if the producers would provide the reservoir they must, also, sometimes have a great deal more.

1146 And, assume that is being drawn on without notice, without a predetermined plan and necessarily so,—do not get the idea we are complaining.

We realize our situation exactly.

Q. Do you give any consideration to providing for a payment based on the amount or quantity of milk involved in this service?

A. No, I haven't. I should hate to have the job assigned to me, of trying, because I think any such attempt would lack a competent finder of the fact and that, certainly, would be vital to the whole plan.

I don't know how we could set that up, but without warning we would not get through a competent tribunal.

Q. Do you think that would be less precise than five cents a hundred that cooperatives handle?

A. It may be precise enough, but I think it would be highly vulnerable at all times.

Q. Are you aware, Judge Thompson, at Colebrook, New Hampshire, there are three plants, one operated by New England Dairies, one by Whiting Company, and one by—

A. No, I have no personal knowledge of that situation; but I think it is fairly implied by what I have heard in this hearing.

Q. There are a number of other locations where there are located very near to each other, in the same town,
1147 two or more plants.

A. That is right.

Q. Do you consider that necessary in the performing of the service, in providing the milk, and so forth, all three plants should be maintained?

A. I am glad you asked me that question, because this is what I think about it. I think there would be no cooperative

there if these proprietary distributors were not able economically to take the supply available at the point.

That is not to say they would not stand right up here and say they would take it. But, again, that is exactly descriptive of the conditions everywhere, and of the result which is found over the shed, when the differences in objectives between proprietary distribution with its essential profit motive, and the farmer-owned cooperative plant is given consideration and becomes a factor.

If every producer delivering at this plant that you speak of were in the same situation, preferred position, by reason of the selection, there would be no occasion having a cooperative plant, and that milk they could make would be available to this market in the same form:

If it was done,—I think the existence of the situation gives some probative force to this case—the proprietary distributors would have to have some pay for it in some form, at least, they ought to have.

1148 Questions by Dr. Miller:

Q. Might not that be one way of taking care of the aspect of the problem; namely, to allow some kind of compensation to any plant that handles milk that tends to enhance its utilization in the market, Class II milk, specifically?

A. Yes. If you think by legislation enactment or legislation, you can convert a commercial corporation into a service company.

Q. You would not have to?

A. It is a grand idea but it is one of these things inhumanly possible.

Q. Could you not still rely on the profit motive?

A. What?

Q. Could you not still rely on the profit motive if you accomplished that end by an appropriate allowance?

A. If you did,—that is being asked for by cooperatives. There would be no profit, and the loss would be the loss in the swapping dollars for dollars.

I am not here to advocate any restrictions of rights these distributors have to profit.

1149 W. P. DAVIS was thereupon recalled as a witness and having been previously duly sworn, testified as follows:

Direct examination

The Witness: This statement is in support of service payments to Producers' Cooperative Associations, a statement of New England Producers' Association.

Cooperative Service Payments

The proposed amendment with respect to payments to cooperative associations would put into operation a principle already established and in operation in Federal Milk Marketing Order No. 27, as amended, regulating the handling of milk in the New York Metropolitan Milk Marketing Area.

It provides for certain payments from the market pool to those cooperative associations of producers which have and exercise full authority in the sale of milk of their members, which use their best efforts in time of short supply to supply Class I milk to the marketing area, which secure the utilization of milk in times of long supply in a manner to assure the greatest possible returns to all producers, and which have their entire activities under the control of their members.

The proposed payments to cooperative associations have their roots in the surplus milk problem. The proprietary handler who finds himself with excess milk over and above his fluid and manufacturing requirements may discontinue the purchase of milk and throw the surplus back on the producers. A cooperative association, because of its contractual relation with its members and because of its very nature as a marketing agency for producers, must continue to handle surplus and to provide the necessary facilities required, even though the market for manufactured milk products may be glutted with regular supplies.

In the milk business someone must stand ready to handle the surplus of milk producers during the seasons when

there is a surplus, unless the milk is to be thrown away or dumped on the market. Likewise, someone must stand ready to close manufacturing plants and let them be idle during periods of short supply when the milk is needed for fluid requirements. Proprietary handlers are likely to find their interests best served by purchasing close to their fluid requirements. The burden of handling seasonal fluctuations in surplus is thrown back onto cooperative associations of producers. These associations must assume responsibility for providing the necessary facilities for handling surplus milk in a manner to insure the greatest possible returns to producers. They act as shock absorbers to the market, absorbing the surplus when it is not required, and making it available for fluid milk sales at other times of the year.

These services which cooperatives perform in finding a market for milk, in standing by ready to handle surplus, in being willing to close manufacturing plants when their milk is needed for the fluid market, are essential services to an orderly marketing program. They are services which benefit producers as a whole.

In the absence of any provisions in the order to compensate cooperatives for these services which they render and which benefit the entire body of producers, the expenses of the cooperative in performing these services is borne by its members alone, and the burden of surplus is thrown upon a part instead of the whole of the industry. The market pool and equalization machinery, on the other hand, is based on the fundamental principle that the burden of surplus shall be distributed uniformly among all producers.

It costs cooperatives money to perform these services which benefit the market. The purpose and effect of the payments to cooperative associations is to distribute equitably among producers the cost of services which result in a higher uniform price to all producers. These payments are simply one feature of the distribution of the burden of surplus milk equitably among all producers.

The proposed amendment would vary the amount of

payment with the degree of service rendered the market by the cooperative. Since NEMPA is a bargaining association performing the services indicated under sub-paragraph (1) of the proposed amendment, the remainder of this statement will deal largely with that portion of the amendment.

By their very nature a bargaining association must benefit all producers in carrying out its purposes. It enables producers to collectively and intelligently market their product. It protects them against exploitation. In its bargaining activities it operates to improve the selling conditions of member and nonmember alike. It seeks to insure the greatest possible returns to all producers.

1153 The stated purpose of New England Milk Producers' Association indicates that it is specifically designed to accomplish ends which will benefit non-members as well as members. Section 1 of Article II of the association's by-laws reads as follows:

"The purpose of this Association shall be to enable its members to secure the full market value of their dairy products; to improve the methods of milk production, distribution, manufacture and use; to encourage the breeding and raising of better dairy stock; to promote the legislative interests of the dairy industry; to foster cooperation in agriculture, and especially in dairying; and, in general, to improve agricultural conditions, and bring about a better understanding between producers of dairy products and the consumers thereof."

It is obvious that first and foremost among the purposes of the organization is that of securing the best possible price for milk. With a market-wide pool in operation in the Boston market, under Federal Order No. 4, the securing of a higher price for NEMPA members of necessity means the securing of a higher price for all producers in the market. The only way in which NEMPA members can get "full market value for their dairy products" is through efforts to maintain the blended price for all producers as high as possible, and to insure that allowable deductions under the order are as low as possible.

1154

These activities benefit non-members and members alike, yet the cost of performing these services is borne by members alone.

In seeking to insure the highest possible level of returns to all producers, other factors besides price are involved. Deliveries of milk must be adjusted to the demands of different handlers. Producers must be shifted and new outlets found. Truck routes must be established or reorganized. These activities, like those of the operating cooperatives, have their roots in the problem of handling surplus milk. A bargaining association does not physically handle milk. But in the process of adjusting deliveries to the demands of different proprietary handlers, it actively participates in the handling of surplus "in a manner to assure the greatest possible returns to producers." NEMPA, through its central office and field staff, is in a position to make whatever readjustments are needed from time to time to help maintain close correlation between supplies of milk and handlers' demands for it.

Within the past twelve months alone, NEMPA has 1155 helped more than 500 producers to adjust their deliveries to meet situations caused by emergency circumstances, and in so doing has also furnished other handlers with needed supplies of milk. This service was performed for all producers faced by the emergencies without regard to whether all producers involved in each case were members of the Association.

In one case a group of producers was deprived of a market because the dealer to whom they were selling stopped receiving their milk during litigation on the question of his non-compliance with the Boston order. Many of the producers involved were not NEMPA members, but the Association found another market for the producers involved with a handler who needed additional supply.

In order to insure efficiency in handling the milk both from the point of view of the producers and the handler,

the field department of NEMPA secured a truckman to collect the milk at a reasonable price, helped him, the producers and the handler to organize the truck route for greatest possible economy.

The milk of these producers all had been sold in the Boston marketing area but not in the city itself. The NEMPA field department secured the forms necessary to obtain approval of the Boston Board of Health 1156 which would permit the producers' milk to be sold in the city proper. The field man also helped the farmers to make out the cards and spent some time in getting T. B. test information and dairy registration numbers for them.

The same handler involved in the situation above also needed other producers in order to carry on an expanding business. The Association was able to transfer to him additional producers from other dealers who had more surplus than they cared to carry.

In two different cases bankruptcies resulting from litigation over non-compliance with the Boston order left groups of producers without a market. As in the other cases mentioned above some were members of NEMPA and others were not. In both cases the Association interested itself in getting a reliable buyer for the bankrupt plants and helped the buyer develop a volume of deliveries at the plant which would enable it to operate efficiently.

Such activities not only benefit the member and non-member producers directly involved, but they help to preserve stability in the market for the benefit of all producers whose milk is included in the Boston pool. But in the absence of any provisions in the order to compensate cooperatives for these services which they 1157 render and which benefit the entire body of producers, the cost of maintaining a field force capable of meeting such problems is borne by NEMPA members alone.

In seeking to maintain stable markets and to insure to producers full market value for their milk, the Association frequently must go further afield. It must sponsor

legislation both in Congress and in the various states, or must use its personnel and finances in coöperation with others for that purpose.

NEMPA was prominent in the legislative activities which resulted in the passage and later amendment of the act under which Order No. 4 is issued. The successful fight for passage of the original act found officers of the Association working at home and in Washington for it. After the original bill was weakened by the Supreme Court decision which declared other provisions of the Agricultural Adjustment Act to be unconstitutional NEMPA again helped to secure the passage of amendments which would clarify the legal situation with respect to marketing agreements.

The amended bill was challenged by certain Boston handlers. In the lengthy litigation which followed NEMPA furnished much evidence in support of the law and the order promulgated under its authority. Members of 1158 the Association staff were important technical witnesses in the case. Their appearance in Court was a cost which was borne entirely by NEMPA members—but the value to all producers in the Boston milkshed of the preservation of the act against legal attack is incalculable.

NEMPA has been a pioneer in the movement toward control of milk markets through cooperation of producers and the federal government. The Association initiated the movement in 1936-37 which resulted in the establishment of the present Order No. 4. The benefits of that order to all producers of the Boston milkshed are well known to the Dairy Division and the Secretary of Agriculture.

Since that order was established New England Milk Producers' Association has constantly analyzed the effects of its provisions as they have become manifest and the organization has repeatedly initiated moves for amendments to the order when such amendments seemed necessary to maintain stabilization of the market.

It is the policy of the Dairy Division to call hearings for the establishment of orders or amendments to orders only

upon the petition of recognized cooperative associations whose activities are controlled by their members. NEMPA consistently has taken the lead in the filing of petitions for hearings on orders and amendments thereto.

It has also been the leader in the presentation of the evidence which is necessary at such hearings to justify the adoption of amendments to orders. An examination of the record of the last hearing in the Boston market, for instance, will show that a large proportion of the producer evidence was provided by NEMPA and that the brief filed in behalf of the Association (Exhibit No. 8 at the hearing in October, 1939,) was the basis of most of the discussion at the hearing. Its proposals and conclusions were the main issues involved.

The Association has also intervened, within the last week, in a hearing in the New York market, where the interests of producers for the Boston market were involved. Evidence was presented to show that the method of pricing New York Class III-C milk sold as cream in the Boston market is discriminatory to New England producers. Specific amendments were proposed to prevent the dumping of New York cream in the Boston market in such a way as to depress the Boston Class II price. These amendments, if adopted, would add from 7 to 10 cents per hundredweight to the Boston Class II price. It is obvious that the benefit therefrom would flow not merely to NEMPA members, but to all producers in the Boston market.

Preparation and presentation of such evidence is a basic requirement for the establishment and operation of a federal order. Without a cooperative to do such work no marketing order could be established or maintained. This fact has been reiterated again and again by officials of the Dairy Division.

New England Milk Producers' Association maintains a research department to gather and coordinate information concerning the dairy industry for use in hearings and in planning activities of the Association so that they will

be directed toward meeting the needs of the market.

It is the only cooperative in the Boston market which maintains such a research department. The information so obtained is of value to all Boston shippers and is used for the improvement of conditions in the entire market. But under present circumstances, the entire cost of this necessary work is borne by NEMPA members.

For forty years it has been the continuous policy of Congress to encourage cooperative associations. The phrasing of the Agricultural Adjustment Act itself indicates the consistent policy of assistance which Congress 1161 has followed in the past and its intention to continue that policy.

Section 10 (b) (1) of the Agricultural Adjustment Act, as amended provides that "The Secretary in the administration of this title shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing acts of Congress, and as will tend to promote efficient methods of marketing and distribution."

The Secretary has found that this Congressional policy is served in the case of the New York market by the insertion in Order No. 27 of the same principle involved in the proposed amendment to the Boston order. Therefore, we believe that the proposed amendment, embodying that principle, should be adopted and made a part of Order No. 4.

1162 Mr. GEYER was thereupon recalled as a witness, representing the H. P. Hood & Sons, Boston, Massachusetts, and having been previously duly sworn, testified further as follows:

1184 Questions by Mr. Forest:

Q. Most of your remarks were directed toward the operating cooperatives. I would like to ask you if you consider that activity performed by the Purity Milk Cooperative

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MATTHEW BENDER & COMPANY


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in Chicago benefited only the members of that Association and not the Market as a whole?.

A. No, I don't contend that. The Purity Milk Association; its members produce about ninety-five per cent of the milk, about four million pounds a day, and, therefore, there were few non-members. Of course, such price raises as were secured benefited the non-members, but, we had many other services non-members did not get, that they were willing to pay for, satisfied with.

My contention is that it is unrewarded. These cooperatives here will go out of this hearing and commence to solicit membership on the basis of what they said and did in this hearing. If they did not provide the functions which Mr. Davis described in the brief, they would have no excuse at all, and certainly could secure no members if they didn't try to get a proper price for their milk.

What influence they have, I don't know. I would assume that whatever weight they carry would be in proportion to the membership and in proportion to the market.

I don't know how the Secretary construes those things. Certainly, the Bargaining Cooperatives are very much in the minority in this market.

Q. You would not deny some of the benefits the bargaining producers gives reflects on all?

A. Not at all. I will go further and say that I would not oppose a non-member deduction that the Secretary might expend. I realize it is a nuisance and it is hard to justify but I hold no brief for non-members. I think everybody should be encouraged, encourage the cooperative movement just as much as I ever did.

1232 CARL SMITH was thereupon called as a witness, representing the Manchester Dairy, Inc., Manchester, New Hampshire, and, having been first duly sworn, testified as follows:

Direct examination

Questions by the Presiding Officer:

Q. Will you give us your full name for the record?

A. Carl Smith.

Q. Whom do you represent?

A. Manchester Dairy, Inc., Manchester, New Hampshire.

Under this No. 3 Proposal, much discussion has been entered into with reference to receiving stations costs and the duties that are performed by the owners of such receiving station. It has not been clearly set forth, at least, not within my hearing, that it does not make any difference as to whether a plant is actually owned by a proprietor or by a cooperative group, if we limit our discussion only to the Act of handling the product. In other words, from the standpoint of the task or performing the services, within the building itself, there should be no difference as to the ownership provided both are equally efficient.

Our own group, organized in 1924, with a place of business within a city of size, find themselves handicapped somewhat due to much higher costs of labor, capital, water, and electric power rates that prevail with many of the receiving stations in the north country. That misfortune, of course, is ours to bear. It is not my intent to register any complaint with regard to these natural conditions other than to refer to them.

Prior to any Federal regulation, it became our task to market this milk shipped in by members in fluid form by making sales to retailers operating not only in Manchester but cities to the south, in Massachusetts, some part of which is now Area 17.

It was only by our ability to make sale of at least ninety per cent of our receipt, in fluid form, that we were able to return competitive prices to our members.

1234 Of course, following the establishment in 1933 of a regulated market and its equalization pool, there came a change to our particular cooperative, in that it was then impossible to receive a revenue for anything like ninety per cent. The particular point which I wish to bring forth here is that even under the establishment of the pool itself, we had to face the question as to whether

we would continue to market fluid milk to the extent we had it, or would resort to some manufacture.

Feeling that we were located in what was strictly a milk market section, we found no justification in making heavy investments for manufacture.

This meant that failing to ship practically all of the milk, we had skim milk which was obliged to be thrown away.

All of these reasons have allowed us to continue the practice of servicing small retail dealers with fluid milk, contracting, if you please, to take care of the natives.

I think that early this afternoon, Mr. Geyer introduced into the record that none of the cooperatives had any such contract, if I understood him correctly.

Our sales are almost entirely made on the basis of verbal agreements, contracts, whereby we agree to take care of our customers' daily needs.

Now, the costs which appear in carrying out such a 1235 program are additional to what they would be in the event that the plant was a branch receiving station owned and controlled by some Boston proprietary dealer who regularly brought from the plant its entire supply into the Boston market.

I refer to what I see fit to call the costs of making sales, taking care of the customers' needs throughout his fluctuating and seasonal demands.

Take the matter of telephone expense. Of course, in all these items that I am going to refer to, our accounting practice does not set itself up in such light that I can give you the exact costs, but I have requested our bookkeeping department, before coming to Boston, to analyze some accounts and make a close estimate of what these costs actually are.

Now, again referring to these telephone costs. Our entire toll calls for the year ending September 1, as I recall it, amounted to \$960.00, and our estimate is that almost that entire lot was chargeable against taking care of customers, talking with them.

This, converted into a hundredweight, is approximately three quarters of a cent a hundredweight.

Now, we come to the matter of collections, bearing in mind that a substantial number of our customers are what the trade know of as "small operators," to use that expression without any inclination to disparage their 1236 efforts. They are earning an honest living and they are performing a service which is as honorable as those who are larger, but they are relatively small. They are owned and operated by one man. As a matter of fact, we have on our list of customers only one corporation. We used to think of these small men, as we got acquainted with them and found them, to carry a higher moral risk, using a banker's expression.

We used to think we were pretty safe against uncollectible accounts.

We have been obliged to change our minds a little because within two years' time, three of such customers died suddenly, and only one of the three did the estate settle for a hundred cents on the dollar.

I submit that in these precarious times, it takes a rather neat little business pretty well carried on and pretty efficiently handled to move under forced sale in order that the estate may be settled and pay all bills to the extent of a hundred cents.

So that we are obliged to believe from our records that a reserve of one half of one per cent to cover bad debts losses is not too high.

When we convert this one half of one per cent—referring to dollar sales, of course, in a hundredweight—we find that that is equivalent to about one cent and a half per hundredweight. That has nothing to do with the costs 1237 of collections.

Many of these small men do not establish any practice of forwarding checks on pay day. Many of them desire that a representative of our cooperative call upon them with some frequency and adjust any slight errors of billing, and pick up the money.

We have attempted to reduce our costs in this particular, but there still is that item. It cannot be easily estimated as to its costs except in terms of hundredweight.

Now, coming to another item. All these smaller buyers

must be serviced with what we refer to as jug milk. Their demands vary daily and seasonally, and a sizable inventory of milk cans is necessary in order to be able to fulfill our contracts.

There again is an item which is not easily determined as to its cost. I do know that we purchased a carlot of cans in May of this year, costing from \$35, and that they were a few days late in July, when all of them were in use in addition to what we already possessed before we bought that shipment.

At no time since the middle of August, have we needed them all. Those cans in November will be required, but it is our best estimate that a sizable lot of empty cans must be carried in inventory throughout the twelve months 1238 with the use of only, perhaps, thirty to sixty days.

I might again refer here, or add to what has already been put in the record, introduced by Judge Thompson, in reference to emergency supplies, having already stated that we feel that we must keep our supplies at Manchester entirely sold throughout the season, because we have no equipment for converting skim milk into by-products, means that the emergency supplies required by our buyers must be secured from others, other handlers who are within the equalization pool, and operating plants further north. Costs which enter into securing these supplies, transferring them to equal requirements of the trade, are not fully reimbursed.

I now come to summarizing somewhat comments already made.

Again repeating myself, were the receiving stations operated as a branch of a Boston proprietary dealer, he should experience no difficulty even with the high costs that prevail in the city of operating a station with the present value, within the twenty cents allowed.

All the products would be moved daily to the Boston plant. There are some of the costs that enter into actually making the sale. Multitudes of buyers whose financial standing may be somewhat in question require emergency lot of cans and many telephone costs enter therein.

1239 Were it not for the fact that we have other activi-

ties which can now, and are being subsidized to take care of these costs that I have outlined, our members would be in an unhappy frame of mind.

They would have reason to be.

I submit that services now rendered to these small buyers someone has to bear the costs that are unescapable.

Twenty cents is not ample to furnish any part.

One might argue that the buyer should pay these costs if they insist. That would mean that he would go on to the streets with milk that costs more than his competitors, that it would seem to me would violate the principles upon which the whole Federal Order is founded.

1240 What I have outlined with reference to ourselves, or in these costs of furnishing buyers with milk no doubt is equally true of other cooperatives who furnished similar services. I believe that we are justified in making a claim for service payments in the amount of the pool as a whole to reimburse us for some of these expenses which are inescapable, is reasonably fair.

1366 Mr. Chester Smith: Mr. Carlton has just handed me some other figures I had requested at the time he testified. Together with the data on the cost of operating the New England Dairies plant.

Mr. Durbin: Might I suggest that as this is in addition to Mr. Carlton's data of the cost of operating plants, that it be copied into the record?

The Presiding Officer: Very well.

Average Country Station Operating Costs of New England Dairies.

Classified according to pounds of milk handled—for twelve months ending June 30, 1940.

Milk Operations

Annual volume in
million of pounds
Cost per cwt.

8-12

\$1.905

4-8

\$2.763

4 or under

\$2.691

1367

Manufacturing Operations

Annual volume in
million of pounds

	12 or over	8-12	4-8	4 or under
Cost per Cwt.	\$.2961	\$.1957	\$.3409	\$.3075

Allowance for the processing of skim milk used in calculating costs of operating manufacturing or mixed plants.

Skim Powder

Barrels

3 cents

Bag

2 cents

Casein

wet curd

3 cents per lb. of dry casein

dry casein

4 cents from the skim milk to the casein

Making soft cheese

4 cents per cwt. of skim.

There is no provision in these allowances for the expense of marketing, freight, and storage of the skim milk powder or of the casein.

Cost of operation of manufacturing or mixed operations of plants of NEW ENGLAND DAIRIES for the year ending June 30, 1940.

When the cost of handling fluid milk is subtracted

by allowing

\$.2523 per cwt.

\$.2883

by allowing

.20 per cwt.

.3004

1419

EXCERPTS FROM GOVERNMENT EXHIBIT No. 2

Table 30.—Average daily receipts of milk from producers as reported by handlers representing approximately 95 percent of the total market, Boston, Massachusetts, by months, August 1937–August 1940

Year and month	Class I 1,000 pounds	Class II 1,000 pounds	Total 1,000 pounds
1937:			
August	1,586	994	2,580
September	1,457	1,122	2,579
October	1,475	938	2,413
November	1,533	488	2,021
December	1,442	646	2,088
Average	1,498	838	2,336
1938:			
January	1,425	748	2,173
February	1,436	844	2,280
March	1,460	1,110	2,570
April	1,461	1,466	2,927
May	1,435	2,030	3,465
June	1,471	2,095	3,566
July	1,495	1,423	2,918
August	1,601	999	2,600
September	1,422	1,149	2,571
October	1,527	909	2,436
November	1,574	494	2,068
December	1,505	590	2,095
Average	1,484	1,155	2,639
1939:			
January	1,426	757	2,183
February	1,392	925	2,317
March	1,405	1,276	2,681
April	1,359	1,684	3,043
May	1,388	2,020	3,408
June	1,413	2,567	3,980
July	1,474	1,785	3,259
August	1,535	1,164	2,699
September	1,422	1,200	2,622
October	1,444	988	2,432
November	1,452	732	2,184
December	1,356	977	2,333
Average	1,422	1,340	2,762
1940:			
January	1,377	1,052	2,429
February	1,398	1,153	2,551
March	1,389	1,516	2,905
April	1,387	1,971	3,358
May	1,409	2,279	3,688
June	1,369	2,651	4,020
July	1,441	1,939	3,380
August	1,435	1,480	2,915

Compiled from reports of the market administrator.

Table 34.—Average daily deliveries per producer selling milk to reporting handlers, and index numbers of seasonal variation in such deliveries in the Boston, Massachusetts, marketing area, March 16, 1934–July 1936, and August 1937–September 1940

(Average for each year = 100)													
Year	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Av.
Average daily deliveries of milk (pounds)													
1934	.....	.....	155.5 ¹	169.4	189.3	200.1	172.2	150.4	146.8	151.1	132.2	134.2	160.1
1935	138.5	144.7	163.7	183.6	200.8	223.6	194.6	175.1	167.6	155.1	130.9	134.2	167.7
1936	140.9	144.6	165.7	184.4	220.3	233.9	199.7	.....	.....	.....	.....	.....	184.2
1937	.....	.....	.....	.....	.....	.....	.....	176.6	173.9	159.8	136.2	139.0	157.1
1938	146.6	153.3	169.3	193.1	226.7	238.1	198.2	181.6	181.1	168.3	145.2	147.1	179.1
1939	152.7	162.7	188.0	212.5	236.1	270.9	223.4	186.8	182.3	167.0	150.3	160.5	191.2
1940	167.4	175.1	197.4	225.9	245.0	269.0	227.9	198.9	.....	.....	.....	.....	213.3
Index numbers of seasonal variation (percent)													
1935	82.6	86.3	97.6	109.5	119.7	133.3	116.1	104.4	99.9	92.5	78.1	80.0	100.0
1938	81.9	85.6	94.5	107.8	126.6	132.9	110.7	101.4	101.1	94.0	81.1	82.1	100.0
1939	80.4	85.1	98.3	111.1	123.5	141.7	116.8	97.7	95.3	87.3	78.6	83.9	100.0
1940	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

¹ March 16–31.

Computed from reports of the market administrator.

Here follows one paster

1517

EXCERPT FROM GOVERNMENT EXHIBIT NO. 6

Market Administrator—Greater Boston Marketing Area

Receipts of Milk by Sources, Class I Milk Sold to Proprietary Handlers,
and All Other Class I Milk of Operating Cooperatives

January-December, 1939

(In Thousands of Pounds)

Class I Milk Sold to Proprietary Handlers													
1939	Number of Producers	Receipts from Producers	Class I Milk ¹ Received from Proprietary Handlers	Total Receipts of Milk	Producer-Buyers ²		Producer-Handlers ³		Handler-Buyers ⁴		All Handlers		All Other Class I Milk
					Number	Quantity	Number	Quantity	Number	Quantity	Number	Quantity	
January	6,910	31,848		31,848	47	5,166	25	113	29	2,754	101	8,033	8,354
February	6,841	31,465		31,465	34	4,067	24	110	30	2,277	88	6,454	6,985
March	7,058	40,914	1	40,915	32	4,375	17	93	31	2,479	80	6,947	8,079
April	7,143	44,987	3	44,990	29	4,239	15	69	27	2,274	71	6,582	7,354
May	7,311	53,297	18	53,315	22	4,456	13	58	23	2,513	58	7,027	7,854
June	7,371	60,856	36	60,892	20	3,530	10	54	25	2,455	55	6,039	7,835
July	7,119	50,489	23	50,512	38	4,920	15	73	27	2,591	80	7,584	8,688
August	7,082	40,735	23	40,758	42	9,119	19	175	30	2,721	91	12,015	7,680
September	7,008	37,434	97	37,531	42	8,469	20	234	30	2,817	92	11,520	5,477
October	6,910	35,179	144	35,323	47	9,475	22	325	29	2,984	98	12,784	5,810
November	6,956	30,170	186	30,356	52	9,606	24	303	28	2,947	104	12,853	6,264
December	6,985	33,229	196	33,425	42	7,924	21	291	28	2,926	91	11,141	5,500
January-December	7,058 ¹	490,603	727	491,330	83	75,343	40	1,898	36	31,738	159	108,979	85,880

¹ Average number per month.² Handlers who received milk from producers.³ Handlers who had own farms and did not receive milk from producers.⁴ Handlers who received all their milk from other handlers.

1593

CARLTON EXHIBIT No. 1

Summary of Country Plant Operating Expenses

For Twelve Months Ending June 30, 1940 for Own Operated Plants and Last Fiscal Year for the Cooperatives.

Includes Twenty-nine Operations Covering Thirty-four Plants

	Milk Shipping Plants	Mfg. or Mixed Plants
Salaries & Wages—including Workmen's Compensation Insurance and payroll taxes	\$43,527.64	\$148,156.04
Fuel, light, power, water, ice and general creamery supplies and expenses	31,479.39	125,755.91
Rent, taxes, insurance and repairs of building & equipment	17,076.25	44,187.72
Hauling costs from farm to country plant (not absorbed by producers) and trucking costs on inter-plant movement of milk	17,938.28	27,753.76
Butterfat losses or shrinkage in butterfat handled in country plants	3,792.43	25,271.92
*Supervision and miscellaneous expenses	29,734.62	39,166.70
Depreciation of buildings and equipment	12,552.00	53,164.91
Interest on investment in plants and equipment	8,250.36	32,607.26
Total Operating Expenses	170,350.97	496,064.22
Less manufacturing allowances on by-products at established rates		124,501.57
Net operating expenses applicable to handling of milk	170,350.97	371,562.65
Pounds of milk handled	67,523,438	130,906,042
Average cost . . . . .	.2523	.2838

* This figure is exclusive of any share of Boston Office Administrative Expense.

EXCERPTS FROM TRANSCRIPT OF 1941 HEARING RECORD ON
PROPOSAL TO AMEND THE BOSTON MILK ORDER

2007 Carl Smith resumed the stand and testified further as follows:

The Witness: On October 18, last year, I appeared in Boston to testify in behalf of our organization as to why I felt that service payments were justified. That testimony appears on the record, Pages 867 to 876, inclusive.

I only wish to amend and add to what I said last fall, to the affect that the costs of rendering these services to small distributors in area 17 where we market a large part of our milk are on the increase, like everything else, labor costs, gasoline costs, and the like, are definitely on the upward trend, and we anticipate that increase will continue.

2008

Whether or not it would be the intent of the Administrator or of the Orders to recognize the small distributors, and to believe that they should continue in business, I would not know, but if they are, to continue, they must be supplied with bulk milk from some source.

It would seem that milk, coming from the pool furnished to them as they require it day by day, is a service which brings to each participant of the pool, itself a benefit.

Criticism has been offered during the past hour or so of the equalization pool, how that it was socialistic in character, and how that certain producers have been harmed by it.

I wonder if it has ever occurred to those same men that if we are to perpetuate such a pool, then all efforts that are made to make sales, Class I sales of the milk benefits each producer who is a party to the pool, itself.

We contend that we render a service to the pool by the act of conducting a business in which our major effort is one of taking bulk milk, and delivering it to the smaller buyers, in such quantities as they may need, and the station allowances which are established under the order are for the purpose of receiving and handling the milk.

2009 There has been no intent, I believe, by the parties at interest to establish a price which is high enough to provide for marketing services and the losses of bad bills, collection costs, and the like, and we want to go on record here, at this time, that these service payments which are asked for, are not exorbitant, and are certainly not too high to meet the costs that are incidental to such services.

2010 A. In our instance, the members own the business.

It is a marketing cooperative established for that purpose, and built up a business among smaller buyers for an outlet, prior to the days of the equalization pool.

Under the equalization pool, we would be as well off if we did not attempt to market any of it, because we could separate it all and draw from the pool, but we continued

to service these small buyers, because we had established some good will before hand.

They are dependent on some source, and we are established in the business.

The costs between the plant and the point of delivery are covered by a freight allowance which is hardly sufficient to cover the actual cost of making the delivery. There are many expenses that are not covered.

2422 The Presiding Officer: I will read that paragraph.

[The Presiding Officer read into the record, Paragraph 3 of the proposal to amend Order No. 4, as amended, at the hearing set for October 14, 1940, Page 4 of the mimeographed copy of the proposed amendments, as follows:

3. Payments to cooperative associations. Strike out section 904.9, paragraph [a], and insert in lieu thereof the following:

2423 "Payments to cooperative associations. Any cooperative association of producers may apply to the Secretary for a determination of its qualifications to receive payments pursuant to this section by reason of its having and exercising full authority in the sale of the milk of its members, using its best efforts to supply, in times of short supply, Class I milk to the marketing area and to secure utilization of milk, in times of long supply, in a manner to assure the greatest possible returns to all producers, and having its entire activities under the control of its members. After such determination, the cooperative association of producers shall be entitled to continue to receive such payment until it has been disqualified by the Secretary, after hearing, for failure to exercise the authority and to perform the functions upon which such determination was based.

"The market administrator shall make the payments authorized by this paragraph, or issue credit therefor, out of the producer-settlement fund on or before the 25th day of each month, subject to verification of the reports upon which such payment is based. Such payments shall be made to each cooperative association of

producers under the following conditions and at the following rates:

"[1] To such association as furnishes its members market information and verifies the weighing, sampling, and testing of the milk delivered by its members 2424 to any handler's plant, and which guarantees payment for such milk to its members, two cents per hundredweight of milk delivered by the members of such association to any handler's plant and on which such handler has made the reports and payments required by this order.

"[2] To such association as in addition to the other qualifications has been determined by the Secretary to have sufficient plant capacity to receive all the milk of producers who are members and to be willing and able to receive milk from producers not members, five cents per hundredweight of milk delivered at plants operated by such association."

Amend section 904.7, paragraph [b], by inserting after subparagraph [4] the following new subparagraph [5], and renumbering the subsequent subparagraphs in this section and paragraph:

"Subtract the total amount to be paid to cooperative associations of producer pursuant to Sec. 904.9 [a]."

2603 DOCTOR CLAIR W. SWONGER resumed the stand and testified further as follows:

Doctor Swonger: Cooperative Service Payments.

We will not undertake to restate the evidence presented last October in support of a payment to cooperatives for services performed for the benefit of the entire market. The case in support of such payments is contained in the testimony of Judge George H. Thompson, W. P. Davis, and others, and in a brief filed jointly by the cooperatives at the conclusion of the hearing.

Since that time we have undertaken to break down our expenditures and determine what proportion might be reasonably assigned to general market services, as com-

pared with the portion representing services available only to members. In doing this, we have sought to take a conservative position, with respect to the amount and types of expenditures assigned to market-wide services.

The figures are based on the last annual report of 2604 the New England Milk Producers' Association, for the year ending July 31, 1940. This report was printed in the New England Dairyman for November, 1940.

Since we are considering only the Boston market, all expenses of secondary market offices and staff have been eliminated. Some re-grouping of expenses has been made, on a more nearly functional basis. Our research department was not established on a full-time basis until July 1, last year, so that expenditures for this purpose are partly estimated.

The table which follows shows the proportion and amount of our Boston market expenses which we consider assignable to general market services.

Officers and directors salaries and expense	75%	\$14,900
Field department	25%	7,400
Research department	90%	6,100
General office expense [including New England Dairyman]	25%	6,600
Total:		\$34,700

This is equivalent to about 2.1 cents per cwt. on the deliveries of N. E. M. P. A. producers in the Boston market.

Most of the work of the general manager, and of the directors in attending meetings, is concerned with 2605 general market problems. They outline and determine the policies of the organization with respect to price and other terms and conditions of sale, and consider modifications of the Federal order to meet changing conditions. They formulate the legislative program of the organization, and in general, direct its activities as a bargaining association. In seeking to insure the highest possible return to producers, they serve both member and non-member alike.

While the work of the field staff is more directly, with members, their activity is necessary to the maintenance of an effective bargaining organization. Such activities as verification of weights and test, and advice on sanitary problems, are specific services for members. In assisting producers to find a market, and in shifting milk from a handler with more surplus than he wishes to carry to another handler who desires to increase his purchases, the field men serve the individual producer and also contribute to the handling of surplus in a manner similar to the operating coöperatives. A part of the services of the field staff is educational in nature, concerned with dissemination of market information, through contacts with individual producers and general meetings of producers. This service is of benefit to member and non-member alike. Without the activities of the field staff, the association would lose its effectiveness as a bargaining organization.

2606 The work of the research department consists of constantly analyzing the operation of the Federal Marketing Order, and in preparing the evidence essential at hearings to adapt the order to changing conditions. For years, this association has taken the leadership in research and statistical work in the Boston market. Very little of the work of this department represents services specifically for members. The service is of benefit to members and non-members alike.

The final classification of general office expenses includes a variety of items. These are essential in varying degree to the maintenance of an effective bargaining organization, capable of performing the services for which such an organization exists. In addition to the ordinary overhead expenses incident to maintaining the organization, we have included a part of the cost of maintaining its official publication. The New England Dairyman for years has been the accepted record of the market. It is used by research men and government agencies as a source of market information. It is available to non-members at a nominal price.

We do not make claim that the figures submitted with respect to our association represent a precise measurement

of the cost of services performed for the benefit of the entire market. The figures represent the portion of our
 2607 expenditures which we consider may be reasonably assigned to market-wide services. Other items of expense, not included in the above tabulation, might also be argued to be assignable to market-wide services performed.

The Presiding Officer: Any questions?

Mr. Merrill: I have a few questions, Mr. Hearing Master. Doctor Swonger, the dues for any N. E. M. P. A. member delivering for the Boston market are 3 cents a hundredweight?

Doctor Swonger: Yes, sir.

Mr. Merrill: Does the N. E. M. P. A. retain any fixed amount per hundredweight for reserve fund?

Doctor Swonger: I think so. I couldn't say definitely.

Mr. Merrill: Do you know how much that rate is per hundredweight?

Doctor Swonger: I believe it is one cent.

Mr. Merrill: So that the 2.1 cents per hundredweight spent on activities for the benefit of the market, plus the reserve of 1 cent per hundredweight, comes to 3.1 cents per hundredweight, and, in addition, have you computed the amount per hundredweight represented by the balance of expenses, which is necessarily allocable to services for the organization or its members?

2608 Doctor Swonger: I think that will have to be restated.

Mr. Merrill: You have listed four items of expense and have allocated certain proportions for services to the market, as I understand it.

Doctor Swonger: Yes.

Mr. Merrill: In the case of officers' and directors' salaries and expenses, you allocated 75 per cent. or \$14,600 to services to the market.

That leaves a balance of 25 per cent. or, according to my rough figuring, a little over \$4,800 allocable to services to the organization and its members.

Doctor Swonger: Yes.

Mr. Merrill: Now, have you the amount—the corresponding amount of cost of the field department allocable to the services of the organization and its members?

Doctor Swonger: It would be the remaining 75 per cent.

Mr. Merrill: Or three times the \$7,400 which I made as \$22,200.

Doctor Swonger: Yes.

Mr. Merrill: Then, ten per cent. of the research cost allocable to the organization is \$610, and the remaining 75 per cent. of the general office expense is three times \$6600 or \$19,800.00?

Doctor Swonger: Yes.

2609 Mr. Merrill: Making a total, according to my quick calculation of about \$47,500.00 allocated to the cost of the organization and its members, or, rather, to the service of the organization and its members.

Doctor Swonger: That would be correct.

Mr. Merrill: Have you computed how much per hundred-weight that amounts to?

Doctor Swonger: No. It is obvious from another figure which I gave, that it would amount to around 3 per cent.

Mr. Merrill: So that the total expenses accounted for amounted to a little more than 6 cents per hundredweight on milk delivered by members supplying the Boston pool including the one cent for the reserve fund.

Doctor Swonger: Including the one cent, yes.

Mr. Merrill: Yes.

Mr. W. P. Davis: The Greater Boston market—there is no specific allocation to reserve fund. He indicated approximately 1 cent. There is no specific allocation.

The Presiding Officer: Do you stand corrected, Doctor Swonger?

Doctor Swonger: Yes. I indicated that I did not know. I made a guess. In fact, I was wrong.

The Presiding Officer: Any further questions?

2610 Mr. Geyer: In rendering this service to the market, your primary object, of course, is to render it to your members, is it not?

Doctor Swonger: We cannot perform it for the one group

without, at the same time, performing it for the other.

Mr. Geyer: Yes. Your sole reason for existence is to serve your members, is it not? .

Doctor Swonger: Yes.

Mr. Geyer: So that, primarily, you render this service to your membership, and incidentally, to the rest of the market, as you claim.

I doubt that the rest of the market would agree, but, as you claim, you are doing it incidentally to the rest of the market, not primarily; is not that so?

Doctor Swonger: Most of the services which we perform—perhaps I should say not most but a substantial proportion of the services which we perform benefit members and non-members, alike.

It is impossible to separate one group from another.

Mr. Geyer: Pardon me?

Doctor Swonger: It is inevitable, I think, in the nature of a bargaining association.

Mr. Geyer: Your cooperative is about how old, do you know? Thirty years, or so—twenty-five?

Doctor Swonger: Twenty-five would be a little nearer.

2611 Mr. Geyer: That has always been a big problem, the member and the non-member, long before we had the Government Order.

Doctor Swonger: Yes, the membership have carried the burden of the problem for these services.

Mr. Geyer: And there is nothing new about this situation that should be brought out, is there?

Doctor Swonger: I think that equity requires that some portion of that burden be borne by non-members as well.

Mr. Geyer: That may be your opinion.

The point I am trying to bring out is: Is not it true that you organized and carried on your cooperatives for some years, knowing that some service which you rendered would, go to non-members without any cost to them?

Doctor Swonger: That is true.

I do not know that the equity of that situation justifies its continuation.

2612 JOHN L. CARTEN, JR. resumed the stand and testified further as follows:

Mr. Carten: I want to testify as a producer of milk who is not a member of a qualified cooperative.

The first thing that I want to emphasize is that in my mind the money in the pool is producers' money and if the majority of the producers decide to use some of it for the benefit of the market, as a non-member, I should feel bound to accept their decision democratically and go along with it, even if I disagreed.

However, as a non-member, I realize that things are taking place daily in the milk market and in the municipal, state, and national governments that affect my income just as much as though my cows did not get milk-dry.

Now, obviously, I cannot be in all those places, and it is worth a considerable amount of money to me to feel that representatives of producers are offering—are watching my interests every day in those places.

Now, when it comes to operating coöperatives, it is a source of satisfaction to me to know that while I sell to a proprietary dealer, I do not have a choice between selling to a proprietary dealer or hanging myself.

The fact that there are cooperative plants which will care for my producer's milk is a good insurance that proprietary dealers will conduct their relationships with producers fairly. And there is another advantage of operating cooperatives and that is, it is a yardstick by which I can measure the efficiency of a proprietary dealer's services to the market.

2613 If I feel that my dealer is more efficient and can give me advantages that I observe and are being accorded by cooperative handlers, I am much more satisfied to sell to cooperative dealers, but, obviously, if there were no cooperatives, I would not have any way of knowing whether that was so or not; and for those reasons, as a non-member, I want strong cooperatives and want to be recorded in favor of the proposal in Section 17 of these hearings.

The Presiding Officer: Any questions?

Mr. Geyer: Why do you not join a cooperative and get

this service for 3 cents instead of 5 cents, or something like that?

Mr. Carten: I said I was not a member of a recognized cooperative. I am a member of an association that is not a recognized cooperative, and, in the first place, it is a small association, but there are those who love it, and, in the second place, it was formed to care for a very local interest, and that, when we find cooperatives who can perform these other services of a wider nature of which I have spoken as benefiting me, I am almost sure that these very particular local interests which are uppermost in their mind, will join them.

Mr. Geyer: I would like to ask you another question.

Are you meaning to say that you would contribute 5 cents a hundred out of your milk check to keep a cooperative running that buys milk over in Vermont or Maine, when you live in a 40 mile zone and enjoy almost a quarter of a cent premium for your milk?

Mr. Carten: Yes, sir. I would.

When I compare the benefits that I would get out of a payment of that kind with the benefits that I get out of my local taxes, I think that the advantages would compare very favorably.

EXCERPTS FROM GOVERNMENT EXHIBIT NO. 7
Market Administrator—Greater Boston Marketing Area

Total Receipts

From Producers Supplying Milk to the Greater Boston Marketing Area

(In Thousands of Pounds)

Month	From Producers Supplying Handlers			Own Farm Production		Total Receipts
	Regular	New	Total	Of Handlers Receiving Milk from Producers	Of Producer-Handlers	
1937						
August.....	85,391	442	85,833	558	2,556	88,947
September.....	81,969	1,143	83,112	518	2,578	86,208
October.....	78,593	1,830	80,423	605	2,621	83,649
November.....	64,312	1,015	65,327	587	2,610	68,524
December.....	68,674	1,175	69,849	625	2,670	73,144
Total, August-December, 1937.....	378,939	5,605	384,544	2,893	13,035	400,472
1938						
January.....	71,406	1,240	72,646	669	2,640	75,955
February.....	67,364	1,249	68,613	655	2,417	71,685
March.....	83,398	1,300	84,698	809	2,605	88,112
April.....	91,729	1,402	93,131	788	2,688	96,607
May.....	111,450	2,241	113,691	822	2,826	117,339
June.....	111,428	1,670	113,098	806	2,818	116,722
July.....	94,989	753	95,742	772	2,859	99,373
August.....	84,818	737	85,555	728	2,907	89,190
September.....	80,314	1,282	82,096	680	3,021	85,797
October.....	79,343	1,172	80,515	785	3,062	84,362
November.....	65,386	877	66,263	793	2,958	70,014
December.....	68,817	883	69,700	738	3,088	73,526
Yearly Total, 1938.....	1,010,942	14,806	1,025,748	9,045	33,889	1,068,882

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Market Administrator—Greater Boston Marketing Area

Total Receipts

From Producers Supplying Milk to the Greater Boston Marketing Area

(In Thousands of Pounds)

Month	From Producers Supplying Handlers			Own Farm Production		Total Receipts
	Regular	New	Total	Of Handlers Receiving Milk from Producers	Of Producer- Handlers	
1939						
January	72,265	911	73,176	889	3,178	77,243
February	69,524	854	70,378	814	2,941	74,133
March	88,964	725	89,689	939	3,243	93,871
April	97,676	626	98,302	974	3,286	102,562
May	112,511	1,017	113,528	993	3,450	117,971
June	125,184	1,220	126,404	953	3,354	130,711
July	106,297	805	107,102	817	3,308	111,227
August	88,216	559	88,775	709	3,356	92,840
September	83,001	594	83,595	738	3,414	87,747
October	79,865	471	80,336	742	3,614	84,692
November	69,602	447	70,049	673	3,605	74,327
December	76,405	563	76,968	820	3,745	81,533
Yearly Total	<u>1,069,510</u>	<u>8,792</u>	<u>1,078,302</u>	<u>10,061</u>	<u>40,494</u>	<u>1,128,857</u>

Market Administrator—Greater Boston Marketing Area

Total Receipts

From Producers Supplying Milk to the Greater Boston Marketing Area

Preliminary Figures—To be Revised

(In Thousands of Pounds)

Month	From Producers Supplying Handlers			Own Farm Production		Total Receipts
	Regular	New	Total	Of Handlers Receiving Milk from Producers	Of Producer-Handlers	
1939						
September.....	82,766	602	83,368	736	3,448	87,552
October.....	79,557	478	80,035	775	3,648	84,458
November.....	69,304	464	69,768	705	3,630	74,103
December.....	76,389	573	76,962	806	3,769	81,537
Total, September-December, 1939.....	308,016	2,117	310,133	3,022	14,495	327,650
1940						
January.....	79,356	604	79,960	922	3,731	84,613
February.....	77,537	530	78,067	758	3,165	81,990
March.....	93,961	433	94,394	802	3,276	98,472
April.....	104,832	366	105,198	835	3,229	109,262
May.....	118,760	414	119,174	839	3,353	123,366
June.....	124,899	484	125,383	814	3,295	129,492
July.....	108,608	497	109,105	768	3,308	113,181
August.....	94,233	428	94,661	775	3,164	98,600
September.....	85,123	289	85,412	764	3,200	89,376
October.....	84,071	312	84,383	792	3,338	88,513
November.....	73,321	402	73,723	823	3,267	77,813
December.....	78,971	385	79,356	875	3,419	83,650
Yearly Total, 1940.....	1,123,672	5,144	1,128,816	9,767	39,745	1,178,328
Total, September-December, 1940.....	321,486	1,388	322,874	3,254	13,224	339,352

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Market Administrator—Greater Boston Marketing Area

Total Receipts

From Producers Supplying Milk to the Greater Boston Marketing Area

Preliminary Figures—To be Revised

(In Thousands of Pounds)

Month 1941	From Producers Supplying Handlers			Own Farm Production		Total Receipts
	Regular	New	Total	Of Handlers Receiving Milk from Producers	Of Producer- Handlers	
January.....	82,316	272	82,588	807	3,616	87,011
February.....	76,897	277	77,174	742	3,249	81,165
March.....	95,984	264	96,248	900	3,593	100,741
April.....	.....	.....	.....	.....	.....	.....
May.....	.....	.....	.....	.....	.....	.....
June.....	.....	.....	.....	.....	.....	.....
July.....	.....	.....	.....	.....	.....	.....
August.....	.....	.....	.....	.....	.....	.....
September.....	.....	.....	.....	.....	.....	.....
October.....	.....	.....	.....	.....	.....	.....
November.....	.....	.....	.....	.....	.....	.....
December.....	.....	.....	.....	.....	.....	.....
Yearly Total, 1941.....	.....	.....	.....	.....	.....	.....

Market Administrator—Greater Boston Marketing Area

Monthly Utilization
Of Milk Received from Producers

(In Thousands of Pounds)

Class I Milk

Month	Marketing Area and Adjoining Areas*		Outside Markets		Total	Class II Milk	Percent Class I Milk
	Excluding "Relief" Milk	"Relief" Milk	Excluding "Relief" Milk	"Relief" Milk			
1937							
August.....	47,286		7,612		54,898	30,935	64.0%
September.....	45,573		3,814		49,387	33,725	59.4
October.....	47,193	780	3,490		51,463	28,960	64.0
November.....	44,445	2,065	4,388	24	50,922	14,405	78.0
December.....	44,228	2,512	3,150	82	49,972	19,877	71.5
Total, August-December, 1937..	228,725	5,357	22,454	106	256,642	127,902	66.7%
1938							
January.....	44,278	2,443	2,854	83	49,658	22,988	68.4%
February.....	39,871	2,626	2,552	77	45,126	23,487	65.8
March.....	44,827	3,092	2,393	87	50,399	34,299	59.5
April.....	42,997	3,742	2,243	84	49,066	44,065	52.7
May.....	43,930	4,383	2,149	83	50,545	63,146	44.5
June.....	42,873	4,622	2,440	84	50,019	63,079	44.2
July.....	41,640	4,724	5,012	83	51,459	44,283	53.7
August.....	43,193	5,077	6,006	85	54,361	31,194	63.5
September.....	40,217	4,529	2,800	78	47,624	34,472	58.0
October.....	44,235	5,352	2,961	78	52,626	27,889	65.4
November.....	41,811	6,349	3,512	81	51,753	14,510	78.1
December.....	41,727	7,117	2,713	85	51,642	18,058	74.1
Yearly Total, 1938.....	511,599	54,056	37,635	988	604,278	421,470	58.9%

* Milk marketing areas numbered 10A, 10D, 13A, 14A, 15A, and 17, as designated by the Massachusetts Milk Control Board on December 1, 1938.

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Market Administrator—Greater Boston Marketing Area

Monthly Utilization
Of Milk Received from Producers
(In Thousands of Pounds)

Class I Milk

Month 1939	Marketing Area and Adjoining Areas*		Outside Markets		Total	Class II Milk	Percent Class I Milk
	Excluding "Relief" Milk	"Relief" Milk	Excluding "Relief" Milk	"Relief" Milk			
January.....	42,005	5,051	2,598	81	49,735	23,441	68.0%
February.....	38,449	3,751	2,033	72	44,305	26,073	63.0
March.....	43,084	4,335	2,331	78	49,828	39,861	55.6
April.....	41,116	3,797	2,185	73	47,171	51,131	48.0
May.....	43,409	4,130	2,143	83	49,765	63,763	43.8
June.....	42,335	4,045	2,312	82	48,774	77,630	38.6
July.....	42,868	3,838	5,143	72	51,921	55,181	48.5
August.....	43,288	3,991	5,956	68	53,303	35,472	60.0
September.....	42,149	3,707	2,045	66	47,967	35,628	57.4
October.....	44,635	3,651	1,927	70	50,283	30,053	62.6
November.....	42,320	3,597	2,522	74	48,513	21,536	69.3
December.....	41,847	3,661	1,613	78	47,199	29,769	61.3
Yearly Total.....	507,505	47,554	32,808	897	588,764	489,538	54.6%

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* Milk marketing areas numbered 10A, 10D, 13A, 14A, 15A, and 17, as designated by the Massachusetts Milk Control Board on December 1, 1938..

Market Administrator—Greater Boston Marketing Area

Monthly Utilization
Of Milk Received from Producers

Preliminary Figures—To be Revised

(In Thousands of Pounds)

Class I Milk

Month	Marketing Area and Adjoining Areas*		Outside Markets		Total	Class II Milk	Percent Class I Milk
	Excluding "Relief" Milk	"Relief" Milk	Excluding "Relief" Milk	"Relief" Milk			
1939							
September.....	41,902	3,707	1,865	66	47,540	35,828	57.0%
October.....	44,201	3,650	1,752	70	49,673	30,362	62.1
November.....	41,931	3,597	2,352	74	47,954	21,814	68.7
December.....	41,606	3,661	1,612	78	46,957	30,005	61.0
Total, September-December, 1939.....	169,640	14,615	7,581	288	192,124	118,009	61.9%
1940							
January.....	42,387	3,333	1,500	79	47,299	32,661	59.2%
February.....	39,961	3,514	1,338	80	44,893	33,174	57.5
March.....	42,556	3,932	1,305	78	47,871	46,523	50.7
April.....	40,766	3,980	1,235	68	46,049	59,149	43.8
May.....	42,953	4,004	1,303	70	48,330	70,844	40.6
June.....	40,977	3,383	1,331	65	45,756	79,627	36.5
July.....	41,677	3,749	3,324	72	48,822	60,283	44.7
August.....	40,560	3,899	3,841	73	48,373	46,288	51.1
September.....	41,349	3,314	1,803	68	46,534	38,878	54.5
October.....	43,552	3,734	1,757	73	49,116	35,267	58.2
November.....	41,762	3,495	2,522	69	47,848	25,875	64.9
December.....	42,038	3,412	1,732	76	47,258	32,098	59.6
Yearly Total, 1940.....	500,538	43,749	22,991	871	568,149	560,667	50.3%
Total, September-December, 1940.....	168,701	13,955	7,814	286	190,756	132,118	59.1%

* Milk marketing areas numbered 10A, 10D, 13A, 14A, 15A, and 17, as designated by the Massachusetts Milk Control Board on December 1, 1938

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Market Administrator—Greater Boston Marketing Area

Monthly Utilization
Of Milk Received from Producers

Preliminary Figures—To be Revised

(In Thousands of Pounds)

Class I Milk

Month 1941	Marketing Area and Adjoining Areas*		Outside Markets		Total	Class II Milk	Percent Class I Milk
	Excluding "Relief" Milk	"Relief" Milk	Excluding "Relief" Milk	"Relief" Milk			
January.....	42,842	3,266	1,611	77	47,796	34,792	57.9%
February.....	39,054	3,095	1,766	70	43,985	33,189	57.0%
March.....	43,889	3,264	2,358	74	49,585	46,663	51.5%
April.....							
May.....							
June.....							
July.....							
August.....							
September.....							
October.....							
November.....							
December.....							
Yearly Total, 1941.....							

* Milk marketing areas numbered 10A, 10D, 13A, 14A, 15A, and 17, as designated by the Massachusetts Milk Control Board on December 1, 1938.

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GOVERNMENT EXHIBIT No. 11

Market Administrator—Greater Boston Marketing Area

Receipts of Milk by Handlers from Producers
Classified According to Membership in Qualified Co-Operatives*

March 1941

Thousands
of Pounds

Receipts from members of qualified operating co-operatives at plants of such co-operatives.....	42,326
Receipts from members of qualified bargaining co-operatives.....	23,713
Receipts from non-members of any qualified co-operative.....	30,209
Total.....	96,248
Total receipts at plants of qualified operating co-operatives.....	43,075
Total receipts at all other plants.....	53,173
Total.....	96,248

* Co-operative associations which the Secretary of Agriculture has determined to be qualified under the Capper-Volstead Act and to be performing certain specified marketing services.

May 15, 1941.

3261 Filed Dec. 11, 1948. Harry M. Hull, Clerk

DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 12944

DELBERT O. STARK, ET AL., PLAINTIFFS

v.

CHARLES F. BRANNAN, Secretary of Agriculture of the United
States, DEFENDANT

Depositions of: Thomas Francis Walsh, Marguerite Denton, Albert R. Denton, George O. Stebbins, L. A. Cooley, and Delbert O. Stark, taken by the Defendant at Burlington, Vermont, on December 2, 1948 before Katharine A. Gardner, Notary Public.

Published in Clerk's Office, Dec. 11, 1948, Harry M. Hull, Clerk, by Anne
W. Lyddane, Deputy Clerk

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3263 DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 12944

Notice to Take Depositions upon Oral Examination

DELBERT O. STARK, ET AL., PLAINTIFFS,

v.

CHARLES F. BRANNAN, Secretary of Agriculture of the United
States, DEFENDANT

To Edward B. Hanify, Esquire, Attorney for Plaintiffs;
Ropes, Gray, Best, Coolidge & Rugg, 50 Federal Street,
Boston 10, Massachusetts, and

To G. Bowdoin Craighill, Esquire, Attorney for Inter-
venor; McKenney, Flannery & Craighill, Hibbs Building,
Washington 5, D. C.

Please take notice that at 10 A. M., Eastern Standard
Time, on the 2nd day of December 1948, in the office of the
United States Attorney, United States Court House, Bur-
lington, Vermont, the defendant in the above-entitled action
will take depositions of Marguerite Denton, who resides
in Stowe, Vermont; George Stebbins, who resides in Enos-
burg, Vermont; Delbert O. Stark, who resides in Randolph,
Vermont; Francis Walsh, who resides in Greenwich, New
York; and L. A. Cooley, who resides in Bradford, Ver-
mont, upon oral examination pursuant to the Federal Rules
of Civil Procedure, before Katherine Gardner, a notary
public, or before some other officer authorized by law to
take depositions. Oral examination will continue from day
to day until completed.

3264 Please take further notice that at 10 A. M., Eastern
Standard Time, on the 8th day of December 1948, in
the office of the United States Attorney, United States
Post Office Building, Boston, Massachusetts, the defendant
in the above-entitled action will take the depositions of
William C. Welden, whose principal place of business is 500
Rutherford Avenue, Boston, Massachusetts; and of Harvey

P. Hood, President of H. P. Hood and Sons, Inc., whose principal place of business is 500 Rutherford Avenue, Boston, Massachusetts, upon oral examination pursuant to the Federal Rules of Civil Procedure, before Edward J. Grace, a notary public, or before some other officer authorized by law to take depositions. The oral examination will continue from day to day until completed.

You are invited to attend and cross-examine at both places.

J. STEPHEN DOYLE, JR.,
Special Assistant to the Attorney General,
Department of Justice, Washington, D. C.

MARY CONNOR MYERS,
Office of the Solicitor,
Department of Agriculture,
Washington, D. C.

Dated November 29, 1948.

A true copy. Attest:

CHRISTOPHER GHILONI,
Deputy U. S. Marshal.

3265 DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 12944

DELBERT O. STARK, ET AL., PLAINTIFF

v.

CHARLES F. BRANNAN, Secretary of Agriculture of the United
States, DEFENDANT

Pursuant to the attached Notice to Take Depositions Upon Oral Examination, in accordance with the Federal Rules of Civil Procedure, I the undersigned Katharine A. Gardner, Notary Public, in the Court Room in the United States Post Office Building at Burlington, Vermont, on December 2nd, 1948 took the depositions of Thomas Francis Walsh, George O. Stebbins, Marguerite Denton, Albert

R. Denton, Delbert O. Stark and L. A. Cooley. Appearances were as follows:

Edward B. Hanify, Esq. of the firm of Ropes, Gray, Best, Coolidge & Rugg, Esqs., 50 Federal St., Boston, Mass., Attorney for the plaintiff.

Frank B. Lent, Esq., 11 West 42nd St., New York, N. Y., Attorney for Intervenor; and

Mary Conner Myers, Office of the Solicitor, Department of Agriculture, Washington, D. C., Attorney for the Defendant.

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STIPULATION

Upon stipulation and agreement by and between the attorneys of record inspection and reading of the transcribed depositions were waived by the parties and the deponents, and the signatures to this stipulation and to these depositions were in like manner waived.

THOMAS FRANCIS WALSH being first duly cautioned and sworn to testify to the truth, the whole truth and nothing but the truth, deposes and says as follows:

Direct examination.

By Mrs. Myers:

Q. Mr. Walsh, what is your full name?

A. Thomas Francis Walsh.

Q. Your home is in Greenwich, New York?

A. Yes.

Q. And you are one of the plaintiffs in the case of Delbert O. Stark, et al. vs. Wickard, and Delbert O. Stark, et al. vs. Brannan?

A. Yes.

Q. You were producing milk in 1941 which was being shipped to the Boston Marketing Area?

A. Yes.

Q. Were you producing milk in 1941?

A. Yes.

Q. To whom were you shipping and selling your milk?

A. H. P. Hood.

Q. Where was it delivered?

A. At Eagle Bridge.

Q. How long had you been shipping and selling your milk to Hood at that time, in 1941?

A. I have been shipping for a long time; I don't remember just how long.

3267 Q. Are you still shipping to the same one?

A. Right at present I am shipping it to Glens Falls, New York to Mr. Crandall.

Q. How long have you been shipping there?

A. I should say perhaps March, or February.

Q. But you intend to go back to Hood?

A. That's right.

Q. Did you attend the public hearings in June, 1941 on Amendments to the Boston Milk Order?

A. I didn't, but a representative did for me.

Q. What do you mean by your representative?

A. Well, I am President of the Independent Milk Producers Association, and I was then, too, and we have a representative by the name of William Flynn, and he attended those hearings.

Q. Did you vote at the referendum?

A. Oh, we voted for a Union.

Q. At what time, in 1941?

A. Perhaps not at that time, I don't remember; I think I did but I wouldn't say for sure. Yes, I did.

Q. But you did not attend those hearings yourself?

A. I went to some hearings, but I couldn't tell you just what ones they were—that is seven years ago and I forget.

Q. Did Mr. Flynn make a report to the Cooperative Association on the hearings?

A. Yes, he always reports.

Q. Did he report particularly in connection with the proposed amendments dealing with Cooperative payments?

A. I am not quite certain what he did on that.

3268 Q. You don't know if he did?

A. Oh, yes, I know he did.

Q. Do you recall anything that was said, or reported?

A. Just that he opposed, is that what you are talking about—taking dues out of our pay?

Mrs. Myers: Yes.

A. (continued:) Yes, he did, he opposed it very much.

Q. Do you oppose it?

A. Yes, through him I did at that time.

Q. On what ground?

A. I don't see why anyone has any right to go into my envelope and take anything out without my consent.

Q. You know how the Boston Marketing Order and all other Milk Orders are issued, don't you, that the Secretary of Agriculture cannot issue one unless two-thirds of the producers vote in favor of it in the market?

A. Yes, that's right.

Q. And do you know that two-thirds of the producers voted in favor of those amendments?

A. As an independent producer I think I have a right to oppose it.

Q. Of course, you have a right to oppose it. Did you oppose it during the public hearings?

A. My representative did. I voted against it.

Q. Do you know whether he offered any testimony against those amendments on behalf of the independent organization?

A. I am sure he did.

Q. You don't know what he said?

A. No, I am not certain.

Q. Was there any meeting of the Cooperative prior to the hearings to determine what action the Cooperative should take at the hearings?

A. That's right.

Q. Do you remember what that was?

A. I was not there.

Q. Were the reasons for opposing it stated?

A. Yes, but I forget just what they were now.

Q. Mr. Walsh, in the referendum on the August 4, 1941 amendments to the Boston Order, those are the amend-

ments that pertain to the Cooperative payments, you did not vote, did you?

A. I think I must have voted.

Q. If I tell you that the records of the referendum officer show you did not vote, do you think that would be true?

A. If you can show me I did not vote, I would have to agree.

Q. In the fall of 1941, in September, another referendum was conducted concerning some other amendments to the Boston Order. Did you vote in that?

A. I cannot say for sure. I know I voted at some different times, but I cannot tell you just the dates of them.

Q. The records of the referendum officer for that referendum show you did not vote.

A. What about voting as a unit?

Q. In March, 1942 there was another referendum and the records of the referendum officer show that at that time you voted in favor of the Order. Do you have a recollection of that?

A. Yes, that is my recollection.

Q. In December, 1944 there was another referendum and the records of the referendum officer show you did not vote there. Is that right?

A. That is according to my recollection.

3270 Q. In April, 1944 there was another referendum and the records of the officer show that at that time your vote was cast by the Independents Cooperative. Do you remember whether that vote was in favor or against the Order?

Mr. Hanify: You mean the Order as a whole?

Mrs. Myers: As amended at that time, Mr. Hanify, 1944.

A. The only thing we opposed in the Order very much was for the deduction of dues. I don't know—we may have gone along with it at different times, but we did object to that.

Q. The Order, you understand, every time it is voted on with amendments, those provisions with regard to Cooperative payments are still in the Order?

A. We were always opposed to it then.

Q. In 1946, in 1947, did you vote as an individual in any referendum?

A. I think after that we voted as a unit, I don't remember.

Q. As an Independent Milk Producers Association?

A. That's right.

Q. Is that a Cooperative qualified under the Boston Milk Order to receive payments from the pool?

A. No.

Q. Did the Cooperative ever attempt to become qualified?

A. We attempted to become qualified to have it as a unit and was successful. Justice Smith came to our meetings and helped us with that.

Q. And you were qualified in 1944?

A. To vote as a unit.

3271 Q. Did the Cooperative Association ever attempt to become qualified to receive payments from the pool, Cooperative payments?

A. I don't remember of ever doing it, but we have been thinking about it lately. We had a split directorate, some directors thought as everybody else was getting it we should have a man in the field to check weights and tests and qualify for it. That is all we lack to qualify for it, but I don't remember—that is what Mr. Smith told us.

Q. Have you been President of that organization for some years?

A. Yes, I have.

Q. Do you recall in 1945 writing to the Department of Agriculture inquiring concerning the possibility of the Independent Milk Producers Association qualifying to receive payments?

A. I wouldn't be surprised if we did inquire about it. I don't think we ever went through with it.

Q. Do you recall receiving an answer from the Department of Agriculture explaining how you could qualify and pointing out that the chief difficulty was a provision in your by-laws to the effect that all milk had to be shipped to Hood & Company?

A. Well, I don't know about that. I am shipping to New York—I still belong to it.

Q. Do you recall receiving a letter from the Department

of Agriculture in answer to your inquiry, which explained to you you couldn't qualify for certain reasons, at that time, to receive the payments?

3272 A. I think that's right, I think we did have to bargain with more than one agent in order to qualify.

Q. You mean by "agent", a milk dealer?

A. That's right.

Q. Your organization has never made any change in its by-laws since that time, have you, to cure that defect?

A. I don't remember. We might have, but I don't remember.

Q. How did you get into this lawsuit, Mr. Walsh—was it your own idea?

A. Well, in a way it was. I knew that the Independents Association was very much against it, and I had heard that Mr. Stark was starting litigation, was working on the case.

Q. How did you hear about Mr. Stark?

A. I think he went to see our representative, Mr. Flynn, and I think perhaps that might be it.

Q. Did you talk to Mr. Stark, or Mr. Stark talk to you?

A. I never talked with Mr. Stark. How long ago do you mean?

Mrs. Myers: I mean in 1941, before this suit was filed.

A. (continued:) No, I had never talked to him the first time.

Q. Had you talked with him since that time until yesterday or today?

A. About a week or so ago.

Q. You talked with him about a week or so ago?

A. Yes.

Q. When you heard that Mr. Stark was conducting litigation, what did you do to get into the case?

A. Well, fellows come to see me, I don't know their names.

3273 Q. What fellows?

A. I don't know their names, they're out of my district, I cannot tell you where they were from.

Q. Were they milk producers?

A. Yes, they were milk producers.

Q. Was there a milk handler with them?

A. There was a Mr. Gould with them.

Q. A field man from Hood?

A. That's right.

Q. He was with how many producers?

A. I would say there was two.

Q. Do you recognize either of the two as among the people who are here today?

A. No, they are not here today.

Q. Have you ever seen them since?

A. No.

Q. What did they say to you and what did you say to them at that time?

A. Well they just wanted to know if I would be a part of Mr. Stark's suit, and I said due to the fact, the way my organization felt, I would, or words to that effect. That's seven years ago you know.

Q. Did they come to you, or did you go to them?

A. They came to me.

Q. Do you know how they happened to know you would be interested?

A. I imagine they knew I was President of the outfit, and they knew we were opposed to it, being at hearings with Mr. Flynn, and I imagine they came to me for that reason.

Q. When you went into this case you went in as an individual, did you not—your Cooperative did not go in?

A. That's right.

3274 Q. Were any of the other members of your Cooperative organization asked to go in as plaintiffs in the case?

A. Well I couldn't say for sure about my organization, but I think perhaps one of them has. I don't know for sure, I think there was one said he would support it financially but did not wish to take part in the suit.

Q. Do you know who that was?

A. I think that was Mr. Flynn.

Q. Do you remember what time you had the conversation with Mr. Gould and the two producers whose names you did not know?

A. No.

Q. Was that in the spring, summer or fall?

A. It was in the summer, I think.

Q. Before the suit was filed?

A. Yes.

Q. That would be the summer of 1941?

A. Yes.

Q. After you told them that you would go along on the suit, what happened next in connection with it?

A. Well I found out that Mr. Stark was hiring Mr. Polikoff and—

Q. Who told you that?

A. I got that through the mail, someone wrote to me.

Q. Do you know who that was?

A. No, I don't know who it was, and I said if it was O. K. with Mr. Stark and the rest, it was O. K. with me.

Q. Did you know who the other plaintiffs were at that time?

A. The only one I knew was Mr. Stark.

Q. Did you know Mr. Stark before that?

A. No.

Q. What arrangements were made about financing this suit, how much were you going to pay?

A. I would have to share my part. I didn't know
3275 how much it would be. They asked me if I would go along and pay my share and I said I would.

Q. Did they give you any idea what the amount of the costs would be?

A. I don't remember that they gave me any idea what it would be.

Q. Did you know this case was to be filed in Washington against the Secretary of Agriculture?

A. Yes.

Q. And that attorneys representing you would have to go there?

A. Yes, that's right.

Q. And you didn't inquire what the cost of the case would be?

A. I suppose it was foolish, but I don't remember asking them what it would cost.

Q. How much has it cost you?

A. I haven't paid anything yet.

Q. Have you any idea what the bill is going to be?

A. Not the slightest. I think there are quite a few have signed up. I think when they get around to it, the Independent Cooperative will help me out any way: I am not sure, but I am quite sure.

Q. Did you talk to Mr. Polikoff yourself at any time?

A. Just through correspondence, that's all.

Q. What was the correspondence, did he tell you what he recommended in the case, or ask you for authority to proceed, or what was the nature of the correspondence between you?

A. As I recall it, it was authority to proceed, or something like that.

3276 Q. Did you write giving such authority?

A. Yes, I did.

Q. Do you have the letter from Mr. Polikoff?

A. No, I have not.

Q. Did you keep a copy of the letter which you wrote to him?

A. No, I haven't a copy of any—this went completely out of my mind until a few weeks ago. I knew we had a right to sue, but I had just forgotten about it.

Q. What do you mean, you knew you had a right to sue?

A. Didn't five of the seven Judges of the Supreme Court rule we had a right?

Q. You mean the decision of the Supreme Court in Stark vs. Wickard that the producers had a right to attack this provision?

A. That's right.

Q. That decision was handed down in 1944 as I recall. Have you heard anything from your attorney since then?

A. Not from Mr. Polikoff, but he was drafted in the Army, I believe, and then they went along with Mr. Hanify, and I think I wrote Mr. Hanify and told you to go ahead with the case, didn't I?

Mr. Hanify: That's right.

How was Mr. Hanify selected to succeed Mr. Polikoff?

A. When Mr. Stark comes on the stand he can tell you that. As far as I was concerned I said I would go along.

Q. You received a letter from Mr. Hanify stating he was being retained in the case?

A. That's right.

Q. And you wrote right back approving of that?

A. That's right, I did.

3277 Q. Have you any of that correspondence?

A. I have no correspondence with this case.

Q. Did you ever see any of the papers that were filed in the case?

A. I did.

Q. What ones did you see, and when?

A. I had to sign one paper, that is all I remember.

Q. Do you know what that was, or when?

A. No, I forget just what it was; I think it was for Mr. Polikoff I had to sign it. It was—I don't remember just what it was, but I did sign papers for Mr. Polikoff.

Q. Was that at the beginning of the case, in 1941?

A. Yes.

Q. Did you sign any since that time?

A. Just my correspondence with these people, my correspondence with Mr. Hanify. I have never had any come to me since then.

Q. Did you ever see a copy of the affidavit that Mr. Stark made in the case that was filed?

A. Yes, I did.

Q. Did you see that?

A. Yes, I saw it.

Q. Do you recall what was in it?

A. No, I don't.

Q. Did you ever see an affidavit made by Mr. L. A. Cooley?

A. I don't believe I did. I don't know.

Q. Did you ever see an affidavit made by Mr. Ezra Merrill?

A. Were they all different ones, or—

Mrs. Myers: All different.

A. (continued:) All different affidavits—I think one was all I saw.

Q. Do you know Mr. Cooley?

A. No, I don't.

3278 Q. L. A. Cooley?

A. I met a man today, I think his name is Cooley.

Q. You never had met him before?

A. No.

Q. Do you know Mr. Ezra Merrill?

A. Well I am not personally acquainted. I may have met him down at Boston at the hearings. I have heard his name. I think he is connected with the Hood organization.

Mrs. Myers: That's right.

A. (continued:) I may have met him seven or eight years ago.

Q. Then you never did discuss this case with him, did you?

A. No, I did not.

Q. Did you ever discuss it with Mr. William Welden of the Hood Company?

A. No, no Hood man has ever discussed it with me.

Q. Since Mr. Gould?

A. That's right.

Q. Did you discuss the case later with Mr. Gould, after that first time?

A. No, he never spoke to me. I have seen him plenty of times, he comes to the house for inspections—high bacteria once in a while, he comes around, but he has never mentioned the case.

Mr. Hanify: I don't think he stated he discussed the case with Mr. Gould. Mr. Gould was with the people that came to see him.

Mr. Walsh: That's right.

Q. Did Mr. Gould say anything to you at that time at all?

A. He was with the group that did, but I don't remember his saying anything about the case.

Q. Do you mean he came with those two producers to see you?

3279 A. He just introduced the fellows with him and told me what it was about.

Q. You knew Mr. Gould before that?

A. Certainly, he's a field man with Hood.

Q. You didn't know the producers with him?

A. No, that's right.

Q. He brought them to your farm?

A. That's right.

Q. And he introduced them to you, is that right?

A. That's right.

Q. And he said what they were there for, is that right?

A. He told me they were interested in the Stark case.

Q. What else did he say?

A. That's all I remember of.

Q. Did he say why he brought them there?

A. Pertaining to the case.

Q. That they were producers shipping to Hood & Company?

A. I understood they were Hood producers and they were interested in the case.

Q. But you never had seen them before?

A. No.

Q. And you never have seen them since?

A. No.

Q. Mr. Gould stated nothing else during the conversation?

A. Pertaining to the case, casually; I might have said, "how is it going", or something like that, but I don't remember.

Q. Have you been in very many lawsuits, Mr. Walsh?

A. No, I never have. I probably show it, too.

Q. Didn't you notice it when it was suggested to you that you enter into a big lawsuit?

A. Oh, yes.

3280 Q. Didn't the conversation impress you?

A. Well, I cannot see—when a man has a right, he certainly will stick up for his convictions, won't he?

Q. I am not questioning your right to enter the lawsuit, I am questioning your lack of recollection of how you hap-

pened to get into one, when you entered a big lawsuit and were not accustomed to lawsuits?

A. I had heard a lot about it at our Directors meetings, I knew our Directors were all opposed to it, that is why I was willing to go on with it.

Q. I want to find out what Mr. Gould and these other producers said to you at that time, as nearly as you can recall?

A. Just they were looking for someone from New York State, I think that was the general idea, to get someone from New York State to go in the case.

Q. Because Mr. Stark was from Vermont?

A. Yes, I think he is from Vermont.

Q. Was the idea to get one from each State in the area?

A. I don't know where the other fellows were from at all. I know Mr. Stark remarked—it appeared to me they wanted someone from New York, they wanted someone from our outfit to go into it..

Q. Is yours the only Cooperative Association?

A. No, we have the Eastern New York, they were opposed to it, too.

Q. What is the Eastern New York Association?

A. They're producers that ship to Salem. We are
3281 producers that ship to Eagle Bridge.

Q. Was the New York—what do you call it?

A. Eastern New York.

Q. Do the Eastern New York producers ship to Hood?

A. They ship to Hood, yes.

Q. Then all the producers in your organization and all the producers in the Eastern ship to Hood & Sons plants?

A. That's right.

Q. What is your understanding of what the plaintiffs, including yourself, expected to get out of this lawsuit? What was the nature of the lawsuit as you understood it, what did you ask the Court to do?

A. Stop taking the dues out of our check. To some it amounted to quite a lot.

Q. How much did it amount to in 1941?

A. I cannot tell you offhand.

Q. You have no idea how much reduction in your price resulted from the Cooperative payments?

A. Well it would be doubtful. It must have been two cents a hundred any way?

Q. I am asking you?

A. I think it was two cents a hundredweight; I am not going to swear to that, but I think that is what it was.

Q. How much would that be in a year approximately?

A. Well, I am a four can producer, that is what they call an average producer—I cannot figure it out in my head, how many pounds a day—320 pounds a day? I think they figure a can 85 pounds.

Q. Two cents a hundredweight, six cents, a day, or seven?

3282 A. Perhaps.

Mr. Leht: 340.

Q. Do you know whether any changes have been made in the Cooperative Payment Provisions of the Boston Milk Order since 1941?

A. I think it has been reduced, hasn't it?

Q. Have you a family, Mr. Walsh?

A. I have.

Q. Are you the man who had six daughters in college at that time?

A. Not in college at that time; I have six daughters though, I have one who is a Navy nurse now—

Q. She was in Nursing School?

A. Perhaps, at that time, and another girl graduated from College, she's a school teacher, and I have another girl in College, two in High School, no, one; one engaged, one married.

Q. How large a farm have you?

A. 103 acres.

Q. How many cows did you own in 1941?

A. Oh, let's see, I had a stanchion filled anyway.

Q. Approximately?

A. Eighteen or twenty, something like that. I don't mean they were all milking at the same time.

Q. How many do you have now?

A. I have thirty-one head, that is young stock and all; that is counting everything.

Q. Do you have any other business beside dairy farming?

A. I guess you wouldn't say it was much of a business, I have a few hundred chickens, I have a few eggs.

Q. Do you have any idea how long this case will continue?

A. I don't see why it should continue much longer.

Q. Do you know if the Government loses the case in the lower court it is very probable it will have to appeal it because it is of sufficient importance generally?

Mr. Hanify: You are not trying to discourage the plaintiffs, are you?

Mrs. Myers: No, I am not. I was just curious to understand what Mr. Walsh's understanding of his financial situation is when he treats it so lightly.

Mr. Walsh: If you ever saw the nice poorhouse we have down there, you wouldn't worry either.

Q. Did you have a conference concerning this case a week ago?

A. I did.

Q. With whom?

A. With Mr. Hanify, and there was Mr. Stark.

Q. Did you have a conference with him yesterday?

A. I did. Let's see, yes, I met Mr. Hanify yesterday.

Q. And any of the others?

A. Mr. Stark was there; and, I never met the gentleman before, Stebbins I think was one of them, Cooley; maybe there was another one in there that I am overlooking. No, I guess not, I think that covers it.

Q. To come back to 1941, do you know whether Mr. Gould and the two producers who came to see you, had been to see any other producers and asked them if they would join in the case? Did they say anything of that kind to you?

A. No, they didn't say anything about that to me. I didn't know at that time they had been to see Mr. Flynn. That's seven years ago—I don't think I did.

Q. Did Mr. Flynn tell you they had approached him and he had declined to go into the case?

A. If I heard that it's just recently. He said that he would chip in financially but he didn't want to go to 3284 Washington, just didn't want to get into the case.

Q. Isn't it true what Mr. Flynn said was that Hood and some producers came to him first, but because he had been more or less mixed up in some of the past attempts of Hood to organize a Company Cooperative he did not want to get mixed up in anything like this, so they went and talked it over with you?

A. I couldn't tell you anything about that because I didn't know they had been to Mr. Flynn at that time.

Q. I thought you just said they had been to him?

A. I have heard that lately, they had been to him, but I didn't know it at the time. Mr. Flynn told me after I had signed up that they had been to him.

Q. When it came to the question of paying the legal cost of this case, isn't it true you said at that time, in 1941, you would make a contribution to the expense so long as it didn't cost you more than a dollar or two?

A. Oh, I had an idea it was going to cost me more than a dollar or two. I don't remember of saying that. I might have said it, but I figured it was going to cost more than a dollar or two.

Q. How much did you think it might cost you?

A. From the list of names I seen signed up, I didn't think it would cost too much.

Q. What is that list of names you are talking about?

A. I imagine you will see it before the day is over with.

Q. When did you see it first?

A. Just last night is the first time, but I didn't 3285 know there was so many in it. I heard they were around signing—gosh, why don't you wait and talk with Mr. Stark about it?

Mrs. Myers: I would like to talk with you, Mr. Walsh.

Mr. Walsh: Well, go ahead. I don't know anything about how many there were in the outfit, only what I heard; they had gone around and canvassed some of the producers and had a very large number signed up.

Q. Did you hear that in 1941, before this case was filed?

A. No, I didn't hear that then. I knew there were some were going into it, but I didn't know how many.

Q. You knew there were some going into it?

A. They told me.

Q. Who?

A. The fellows with Mr. Gould.

Q. What did they tell you?

A. Just that there was a group. I thought at first there was five of us, and I think they were holding meetings about this case. We didn't hold any public meetings, as far as I can recall, in regard to the litigation.

Q. Do you know where those meetings you understood were being held, were being held, in what place?

A. No, I didn't know anything about that, only just what I learned recently, and I did know some were signing up. I don't know too much about their business at all.

Q. What was the latest report on this case that you received?

A. Well I got the report when the decision was handed down we had the right to sue, and then Mr. Hanify was called into the Navy and when he got out of the Navy 3286 I think he took up the suit again. That is the way

I understand. My correspondence has been with Mr. Hanify. I never had any correspondence with the Vermont people at all.

Q. If you had that correspondence would you have any objection to the Government having it?

A. With Mr. Hanify?

Q. Or Mr. Polikoff?

A. No, I haven't it, I haven't it myself.

Q. You don't know what the status of the case is now except you understand it is to come on for trial shortly?

A. I understand it is coming for trial shortly.

Mr. Hanify: Is there anything more about the status of the case you think he ought to know, except that it is coming up for trial?

Mrs. Myers: I am inquiring what he does know.

Cross examination by Mr. Lent:

Q. Did you know Mr. Stark before Mr. Gould and these two producers called on you?

A. I never knew Mr. Stark personally.

Q. When Mr. Gould and these two producers called on you, I think you said you discussed the Stark case?

A. Well I meant the case, the group who were opposed to the deduction of dues, that is what we were talking about. I am not quite sure, they might have mentioned Mr. Stark's name—that is seven years ago—you talk with a man seven years ago—I don't know.

Q. Well, this is quite an important case—

A. I know it is and I am doing the best I can.

3287 Q. This was the beginning of it and we want to find out what occurred at the time when Mr. Gould and those two producers called on you?

A. To the best of my recollection I will do the best I can.

Q. Did you sign a paper on that first day that Mr. Gould and those two producers called on you?

A. I don't know. I think I did, but I don't know for sure though. I don't know for sure if I did or not. I don't know for sure. I might of.

Q. Had Mr. Flynn told you to expect this call?

A. Oh, no.

Q. But you had discussed this question of these payments in your Independent Cooperative meetings?

A. The deduction, is that what you are talking about?

Mr. Lent: Yes.

Mr. Walsh: Yes, we had discussed that in the Cooperative meetings.

Q. Had you discussed in the Cooperative meetings the possibility of a lawsuit about these payments?

A. I don't remember.

Q. Had your Cooperative passed any resolution saying that they would reimburse or share with you in any expense you might be put to as a result of such a lawsuit?

A. No, they did not.

Q. You had no resolution to that effect?

A. That's right.

Q. Had there been any discussion about the Co-op sharing with you the expense of such a lawsuit?

A. Not at that time, no.

3288 Q. How is your Cooperative financed?

A. Well, I think we have—well, we take it out of our dues—we get a check twice a month from the Hood Company.

Q. In other words each producer gives to the Hood Company an order to pay the Co-op a certain number of cents or fraction of a cent out of the producer's milk check and that constitutes the dues of the producer to the Co-op, is that right?

A. That's right, and then they send us—

Q. Then the Hood Company honors those orders by sending a check to the Co-op for the total amount represented by those orders?

A. That's right. I don't know as you call it an order. It is an agreement they sign when they join the organization, is that what you mean?

Q. Yes, that is what I mean; they send an order to the Hood Company when they join your organization, for the Hood Company to check off dues and pay it to the organization?

A. When they sign a card the Hood Company deducts whatever they take out.

Q. Do you mind telling me the rate?

A. It started off with half a cent a hundred, and I think it's more. We have never gone into the field too much to get members. We keep just enough members, enough in the treasury so we can go ahead. We never try to—we have never put a man in the field permanently soliciting members of the Hood Company to join our organization; we are not too active—we are not very active at least.

3289 Q. How many producers deliver to the Eagle Bridge plant of the Hood Company?

A. Do you mean of our producers? What do you mean?

Q. No, all producers?

A. I think there are over 300.

Q. Over 300?

A. That's right.

Q. How many belong to your Cooperative?

A. Less than a hundred.

Q. Less than a hundred?

A. That's right.

Q. You started in financing the Cooperative with half a cent checked off according to your remembrance?

A. I am quite sure that's it. I am subject to a mistake, but I am quite sure that is what it is.

Q. It may have been increased since then?

A. It was increased since then.

Q. It wouldn't be more than a cent now, would it?

A. I don't think it is.

Q. Do you know how much that brings into your Cooperative annually?

A. I don't know as I can tell you exactly how much it brings in, but not too much.

Q. Well, in round figures?

A. Well, may be five or six hundred dollars.

Q. Five or six hundred dollars?

A. It might be some over that, and might be a little less than that.

Q. You have some expenses to pay out of that such as sending Mr. Flynn to the Amendments Hearings on your Boston Order, do you?

A. That's right.

Q. So you don't accumulate any big balance?

3290 A. We stay right around a thousand dollars in the treasury, if that is what you are getting at.

Q. Yes. This cooperative never passed any resolution offering to reimburse or share with you the expense of this lawsuit, is that right?

A. No, they did not.

Q. Was there any discussion as to their willingness as a Cooperative to share with you in the expense of this lawsuit before you signed the first paper in the lawsuit?

A. No.

Q. At the time Mr. Gould and the two producers called on you, was there any discussion of the expense of the lawsuit?

A. I think there was.

Q. What was the discussion?

A. I think that I was to pay a certain—not certain, no, but I was to pay a share. I couldn't go too far because I didn't have enough, but if it hurt me too much I think the Hood Company would chip in—I don't know how much, they didn't say how much or anything like that.

Q. Let me see—

A. It was words to that effect.

Q. What do you mean, words to that effect? If the cost run up to such an extent that it would hurt you, the Hood Company would chip in?

A. I think that's it, or words to that effect.

Mr. Lent: That's all.

Redirect examination by Mrs. Myers:

Q. Mr. Walsh, do you know how many producers ship to the Hood plant?

A. I believe it's over 300 producers.

3291 Q. You mean the Eagle Bridge plant?

A. Yes. May be it's close to 400.

Q. Is it your understanding that all of those producers are opposed to the Cooperative payment provisions in the Boston Order?

A. Oh, I wouldn't think they were all opposed to it, no.

Q. You think some of them may be in favor of it?

A. I don't know.

Mrs. Myers: Well, for your information I will say the record in this case shows that out of the 267 producers delivering to Hood—

Mr. Walsh: That was in 1941 you are asking?

Mrs. Myers: Yes—226 voted in favor of the Boston Order with those amendments, and 22 voted against it.

Mr. Hanify: Where does the record show that?

Mrs. Myers: Aplin's affidavit.

Cross examination by Mr. Hanify:

Q. Mr. Walsh, Mr. Lent asked you if there had been any

formal resolution passed by the directors of your organization authorizing the organization to reimburse you for any expenses which you might incur in this case and your answer was in the negative, that there had been no formal resolution. Now have there been discussions between you and the directors of the organization with respect to that?

A. Yes, we had some discussions about it.

Q. What was said to you by the directors?

A. That they would share my expense. When I
3292 went to Boston they asked me if I needed any money, that is, the representative did, and I told them no, I could pay my own way.

Q. And those are milk producers?

A. Every one of them are milk producers.

Q. The members of that organization were opposed to this deduction, as I understand it, before it was incorporated into the Order?

A. That's right.

Q. The organization still remains opposed to the deduction?

A. That's right.

Q. You personally are still opposed to the deduction?

A. That's right.

Q. And this lawsuit is the vehicle by which you express your opposition to the deduction and want to have it ended, is that right?

A. That's right.

Mr. Hanify: That is all.

Redirect examination by Mrs. Myers:

Q. When did those discussions Mr. Hanify questioned you concerning take place, the discussions with the directors?

A. Oh, that is recently. Well, about going to Boston, that is about a week ago; somewhere within the last two weeks.

Q. You had discussions with Mr. Hanify and Mr. Stark concerning this case in Boston?

A. I was in Boston at Mr. Hanify's office.

Q. Mr. Walsh, under the law the Secretary of Agriculture

3293 can only issue an Order after two-thirds of the producers in the area have approved of it. In view of that, do you think that after he has issued such an order with the approval of over two-thirds, that he should throw the order out because a few others ask him to?

Mr. Hanify: Objection to that question.

Mrs. Myers: The objection will be noted and Mr. Walsh will answer.

A. I am not opposed to the Order as a whole. What I am opposed to is the deduction of dues, and I still think they have no right to go into my check and take any money out.

Q. You understand the Secretary cannot take those provisions out himself, he has to take them out when two-thirds of the producers ask him to take them out, or tell him to take them out, and until the two-thirds ask him to, he has to leave them in?

A. Does he require a two-thirds vote for suspension?

Mrs. Myers: No—

Mr. Walsh: Then he could suspend this provision without having a two-thirds vote.

Mr. Hanify: You are asking the witness a legal question and I object to it.

Q. I don't want to ask the witness any legal question at all. My thinking is running like this, Mr. Walsh—you may understand it better—in the recent Presidential election Truman was elected by a majority of this country. The people voted for Truman, Dewey, Wallace and Thurmond. Truman was elected. Do you think Truman should
3294 be thrown out because people who voted for one of the other candidates think that he should have been elected?

A. Of course, I don't think Mr. Truman should be thrown out.

Q. You think the majority should rule in that case?

A. Yes.

Q. If it were your understanding under the Agricultural Marketing Agreement Act, Milk Marketing Orders are is-

sued in that same way, as a result of the vote, would you say the result should be the same, that the majority should rule?

Mr. Hanify: I object.

A. Well I think that is a lot different than Mr. Truman's case. I think the majority of people here wanted to go into my pay check and take some money out of it, and I didn't want them to. I still think that pertains to the Order.

Recross examination by Mr. Hanify:

Q. In response to those questions that have taken on something of a political aspect, I assume if Mr. Brannan, the Secretary of Agriculture, who I read in the papers campaigned for Mr. Truman, inserted in the Boston Order a provision requiring you to contribute to the Democratic National Campaign Fund regardless of whether the majority of the producers voted for that or not, you would be opposed to it?

Mrs. Myers: I object.

A. Yes.

3295 Q. And the principle would be the same as the principle involved in this case you would think?

A. Yes.

3296 GEORGE O. STEBBINS called as a witness by the defendant, being first duly cautioned and sworn to testify to the truth, the whole truth, and nothing but the truth, deposes and says as follows:

Direct examination by Mrs. Myers:

Q. Your name is George O. Stebbins?

A. That is correct.

Q. And you reside in Enosburg, Vermont?

A. I reside in Sheldon; my mail address is Enosburg Falls, R.F.D.

Q. In 1941 were you producing milk for shipment under the Boston Milk Order?

A. I was.

Q. And to whom were you shipping at that time, Mr. Stebbins?

A. H. P. Hood.

Q. At what plant?

A. Sheldon Junction.

Q. How long had you been shipping to them at that time?

A. Well, I have always shipped to them. I have been a producer of H. P. Hood about thirty years.

Q. You became a plaintiff, in the case that was filed against the Secretary of Agriculture in 1941, with four other milk producers, did you not?

A. Yes.

Q. Please state how you happened to become a party in that case?

A. Well, we were pretty well "het" up up there over the Co-ops dipping into the pool, and I got a letter from Mr. Stark down in Randolph telling what he was doing down there and he wanted to know if I would go along with him and help him out, and I agreed to—to do what we could up there. We felt up there that that pool was not to be
3297 dipped into before it was divided up.

Q. Had you known Mr. Stark before?

A. No.

Q. Do you know how he happened to write to you?

A. Well I don't know, I don't know just how he happened to, but I presume he see my name and knew I was a producer and I have been active in farm affairs and he might have heard of me.

Q. Have you now that letter that you received from Mr. Stark?

A. No, I haven't got it. I tried to find it, but I couldn't find it. We tore the house out and moved a lot of papers and things, and in seven years—I couldn't find it. In fact I couldn't find a lot of things I thought I should have had.

Q. Well, I appreciate that situation. You received a let-

ter from Mr. Stark and then you wrote to him saying you would go along with him?

A. I did.

Q. And try to help out?

A. Yes.

Q. Do you remember just what you were supposed to do? Did he ask you to become a party to the case with him?

A. He asked me if I would go along with him and help him out and I agreed to.

Q. In what way were you going to help him out?

A. Well, financially and every other way, as far as I could.

Q. Did you put any limit on the amount of financial help you would give?

A. No.

Q. Did you have any acquaintance with the other
3298 producers in the case, Mr. Stebbins?

A. The other producers?

Q. The other producers who were plaintiffs in the case?

A. No.

Q. Did you know Mr. A. R. Denton?

A. No.

Q. Did you know Mr. Walsh at that time?

A. No.

Q. After you had answered the letter of Mr. Stark, what happened next in connection with the case so far as you were concerned?

A. Well, a lawyer was appointed, and I have kind of forgotten, it's so many years ago, but I remember a lawyer was appointed and the case started, and I remember that the lawyer was—I guess he joined the Army and another attorney was appointed.

Q. How did you learn those things, did somebody write to you about it?

A. Yes, I got a letter from the attorney I think that was appointed. I just don't know, I don't know, I couldn't say now, but I think they came from the attorney's office which was appointed to run the case. I cannot remember his name.

Q. Did you know that the case had been in the court all of the time since 1941 until the present time?

A. No, I had kind of forgotten the case. — Sometimes things are forgotten.

Q. Did you ever receive any bill for the costs of the case?

A. No, I haven't.

Q. Did you have any correspondence as to who would pay the costs?

A. Well I didn't have any understanding, no, but
3299 I supposed when it wound up that we would chip in.

Q. Who do you mean by "we", the parties to the case?

A. Mr. Stark had a number of producers sign up, as I understood, down there, and there was some up in our locality that would be willing to.

Q. Did Mr. Stark have the producers sign up before this case was filed in 1941?

A. Well, I don't know as to that; I wouldn't know about that.

Q. How did you know about these people being signed up?

A. Well I had heard—what he told me; in that letter that I got from him he wanted to know if I would go along and that is the way I got it.

Q. The letter from Mr. Stark?

A. Yes.

Q. Did he say then that he had others signed up who would go along in the beginning, or did he show you a list, or tell you about a list of producers?

A. No, he didn't show me any list. They were going along. Just general information that people wanted to fight it, that people down there wanted to know if I would go along.

Q. What do you mean by "people down there"?

A. Randolph. There was a lot of producers down there that were "het" up over this and they were going along, and I agreed to go along with them.

Q. Did you ever meet Mr. Polikoff, the attorney?

A. No.

Q. Do you know how he was selected, or who selected him?

A. Well, I think Mr. Stark and some others selected him in Boston; they were down to Boston.

Q. From Boston?

A. I think so.

Q. None of the producers were in Boston. Who in Boston helped select him?

A. What?

Q. Who in Boston helped to select Mr. Polikoff?

A. I think Mr. Stark went down there. I don't know just exactly. I was notified he was appointed. I don't know—I cannot remember how that was.

Q. Did any representative of Hood & Company ever talk to you about this case?

A. Well, not—they have always talked about the case, about this, whenever I got a chance to talk with any of them we discussed it, in that way, to get information—that's the way a farmer does, from whoever he can.

Q. Sure, we all do. Did you talk with representatives of Hood & Company about it?

A. No, I don't know as I did. They're not located in my area.

Q. Don't they have a field man in your area?

A. Why, yes, we have field men in my area, but you said Whiting, did you not?

Q. No, Hood?

A. Oh, yes, Hood—I misunderstood you.

Q. At least I should have said "Hood". Have you talked to any Hood field men about the case?

A. Oh, yes, of course, whenever we got a chance to talk to anybody about the case, I did. I wanted to get all the dope I could on it.

Q. What were you told by him about the case?

A. Well they didn't know anything more about it than I did.

3301 Q. Are you a member of the Northern Farms Cooperative?

A. I am.

Q. When did you become a member of that Cooperative?

A. Well I become a member—

Q. Was it not in March, 1943?

A. I think it was—it was after the war started.

Q. I make that suggestion because the Milk Administrator's records show that that was the date.

A. I couldn't remember dates, but it was at that time.

Q. Do you know that the Northern Farms Cooperative receives payments from the pool?

A. I do.

Q. Do you oppose the receipt of those payments by your Cooperative?

A. Well I think they could stand on their own feet.

Q. You think they should not get any payments?

A. No, nor anyone else.

Q. Have you endeavored to induce the Cooperative of which you are a member to withdraw its application for payments?

A. Did I what?

Q. Repeated by reporter: "Have you endeavored to induce the Cooperative of which you are a member to withdraw its application for payments?"

A. No.

Q. Do representatives of your Cooperative appear at public hearings in connection with amendments to the Boston Milk Order?

A. You mean the Northern Farms?

Mrs. Myers: Yes.

A. (continued) I think they do.

3302 Q. Did you ever attend any of those public hearings since June, 1941?

A. Well I have attended—yes, I have, various ones, but I went on my own.

Q. Did you ever get up and say what you thought about those Cooperative Payments at any of those hearings?

A. No, I am hard of hearing and it's hard to catch, and I didn't dare get up.

Mr. Lent: Off the record . . .

By Mrs. Myers:

Q. Do you know what testimony was offered in favor of the Cooperative Payment Provisions in the public hearings?

A. No, I don't know.

Q. Do you know what Cooperatives have to do in order to qualify to receive payments under the Order?

A. Well I couldn't state it, no.

Q. Have you read the Cooperative Payment provisions of the Boston Order?

A. If I have, I have forgot it.

Cross examination by Mr. Lent:

Q. Mr. Stebbins, when you first got this first letter from Mr. Stark did he say that he wanted you to join in the lawsuit?

A. Well, it didn't say it in those words. He said they were opposed to the Co-ops taking the five cents and wanted to know if I would go along with them and see if we could stop it. I don't know as he stated a lawsuit.

Q. You don't remember that he said anything about 3303 court or legal test or lawsuit?

A. Yes, I think so. I think that was in there.

Q. Which one was in there?

A. Legal—

Q. Legal proceeding?

A. Legal proceeding.

Q. Did he say how many producers were going to join with you and him in this legal proceeding?

A. No, no number was given.

Q. Did he mention anything about the expense of the legal proceeding?

A. No, no, I cannot remember. He wanted to know if we would go along and help them out, and if we up there, if we would help out.

Q. Had you heard anything about this proposed legal proceeding before you got the letter from Mr. Stark?

A. Well, it's pretty hard for me to say right now, but I do know—no, I don't believe I do—I cannot say to that.

Q. Well, you said in answer to Mrs. Myers' questions that producers were pretty well "het" up?

A. Yes.

Q. At the time you got this letter from Mr. Stark?

A. Yes, there was a lot of them were.

Q. How did you know the producers were pretty well "het up"?

A. Well you go to the Creamery and talk to one farmer and another, and you bring on about how Co-ops are taking money out of the pool before the price is arrived at, and that is how we got "het up".

Q. How did you find out this provision had been put in the Boston Order?

A. Well, I guess I got it by the grapevine. I cannot say just how I did get it. It wasn't supposed to be known.

Q. Certainly it's supposed to be known, but I didn't think you read the Federal Register which is the official Government publication on these things, so you must have found out in some other way. I am curious how you did find it out.

A. I cannot say how I found that out, I cannot remember.

Q. There had been discussions between you and other producers about this provision before you got the letter from Mr. Stark?

A. Yes.

Q. Did you ever discuss this provision with anybody around the Hood plant, any employees of Hood, before you got the letter from Mr. Stark? Did you ask the superintendent or the field man about this provision in the Order?

A. Well I draw milk from the farm—I did then—used to go every day, and we might have talked in the plant—they all talked together, they're all mutual friends.

Q. Do you remember if in talking in the plant any representative of the Hood Company defended this provision and said it was a good thing?

A. No, I don't remember; I don't remember; I don't remember.

Q. Do you have any producer organization of any kind at that plant?

A. Why, Northern Farms, and a few members belong to the New England Milk Producers Association.

Q. You didn't in 1941 belong to the New England Milk Producers Association, did you?

A. No.

3305 Q. And you didn't at that time belong to Northern Farms?

A. No, I didn't.

Q. So any discussions you had with other producers, were not in Producer Meetings, or anything like that?

A. It wasn't Producer Meetings, no, we didn't have Producer Meetings, but a group of farmers meet and talk without any special call.

Q. I know. Well, I am awfully glad they do. I was not saying you should only talk in meetings, but I just wanted to find out what the facts were. You said you thought Stark picked you out to write to because you were a farmer up there?

A. I presume he had my name. He probably might of—I don't know how he did get my name.

Q. Well, that is the reason I asked you about these meetings as I thought perhaps you were Chairman of some Producer Group, or something?

A. I am Chairman of various things outside of milk.

Q. Other Farmer organizations?

A. Different political concerns.

Q. Well, it's December now, we can drop politics, can't we?

A. Politics shouldn't enter the milk question.

Q. Do you remember signing any paper after the first letter you wrote in answer to Mr. Stark's letter?

A. I don't remember, but I might have. I don't remember.

Q. How large a farm operation have you got, Mr. Stebins? How many acres?

A. In acres or cows?

3306 Q. Both?

A. Well, about 300 acres, that's woods and everything; and 86 head counting young stock; about 56 milkers, and the rest young stock—86 head.

Q. Was it about the same in 1941 as it is now?

A. Well, about the same; we try to keep it along about

the same. Perhaps with a little Government fertilizer the hay has improved some, the potatoes have improved some.

Q. Do you have any business beside farming?

A. Not any paying business. I am a Town official.

Q. How does the Northern Farms Cooperative elect their Directors, do they elect them from territories?

A. The Directors?

Mr. Lent: Yes.

A. (continued) Well I wouldn't think they was elected that way. I just got on to that, how they were elected—I have been a member quite a while. They elect representatives—

Q. Delegates?

A. Well, yes, they would be Delegates, and they go to Montpelier and they elect the Directors.

Q. How many Directors do they have, do you know?

A. Oh, I think eighteen or nineteen Directors—I wouldn't be positive.

Q. Are they all re-elected every year?

A. No, I think some for two or three years—one, two or three years, so there will be some old ones in. Now I am not positive about this but that is my general idea.

3307 Q. How do they elect a Delegate who goes to this Montpelier meeting to vote with the other Delegates to elect the Directors, how is this Delegate elected?

A. Oh, we have a meeting in every local territory. That is, for instance, St. Albans represents Fairfield, Sheldon, Swanton and that area, and they meet out there and they elect their Representative.

Q. So the representative from your territory would be elected at the St. Albans meeting?

A. Yes.

Q. And he would represent you and the other producers in those four townships that you mentioned?

A. Yes. Well, this representative goes to Montpelier and they elect Directors.

Q. Well, the Representative or Delegate goes to the Annual Meeting and elects the Directors that are to be elected that year?

A. Yes.

Q. Do you attend those meetings at St. Albans?

A. "M-hmm".

Q. When was the last one?

A. The last one was in October or September.

Q. That is the meeting of individual producers who are members of this Co-op, is that right?

A. That's right.

Q. That is a District Membership meeting?

A. Yes, that's right.

Q. Did you at that meeting, or at any other meeting, bring up this subject of Northern Farms collecting and being in favor of Cooperative payments?

A. No, I don't remember.

3308 Q. You didn't bring it up?

A. No.

Cross examination by Mr. Hanify:

Q. Mr. Stebbins, are you a pretty even producer?

A. Even?

Q. Are you a pretty even producer throughout the year?

A. I try to be, yes.

Q. Do you have any figures with you with respect to your production in 1946, 1947 and 1948?

A. It just so happens that I have.

Q. Do you have your figures there for the year 1946?

A. 1946, 372,315 pounds.

Q. And that is the total pounds of milk you delivered to Hood for the Boston Market?

A. Yes.

Q. Now would you give me the same figure for the year 1947?

A. 389,316.

Q. And for the year 1948 up to date?

A. Up to December 3, 289,793.

Q. Has your membership in Northern Farms changed your interest in this case any?

A. No, not at all.

Q. Are you still opposed to the Cooperative deduction?

A. I am.

Q. Do you feel that Northern Farms should survive on the dues from its own members?

A. I do.

Q. And that it should not draw any money out of the pool?

A. I do.

Mr. Hanify: That is all.

Redirect examination by Mrs. Myers:

Q. Mr. Stebbins, would you like to see the Boston 3309 Milk Order thrown out entirely, for good, and no Federal Regulation in the area?

A. No, I don't believe I would.

Q. You know, of course, that there are producers in the area who would like to have it thrown out for good?

A. Oh, yes.

Q. Do you think it should be thrown out because they want it thrown out?

A. I don't know, I don't know what the reasons are. There's always people vary.

Q. Yes, but what I mean is this, the majority of the producers in the area want a Boston Milk Order, a minority do not want it. Do you think the Order should be ended because a minority do not want it?

A. No, I don't. I think the Order is a good thing.

Q. You are a large producer, aren't you, Mr. Stebbins?

A. Well I produce more than anyone else at the plant. Yes, I guess you would call me that.

Q. You probably then would be expected to finance a larger portion of this case than the ones—

A. I could afford to, figuring what they have gotten out of me before they make up the price.

Q. Do you know under the Order there are other deductions that are made from the money in the pool before the blended price is figured?

A. Do I know in the Order there are other deductions—

Q. Repeated by reporter: "Do you know under the Order

there are other deductions that are made from the money in the pool before the blended price is figured?"

3310 A. Well, there's five cents and two cents when it started, as I understand it.

Q. But I mean aside from the Cooperative payment provision, do you understand that deductions may be made from the total value before the blended price is figured, for operating expenses and so on, for the various types that are provided in the Order?

A. That would be legal and all right. I would be willing they should do anything like that.

Recross examination by Mr. Lent:

Q. Mrs. Myers' question suggests you can help me, if you will. What becomes of the milk from the Enosburg Falls plant, is that the name of the plant where you deliver?

A. No, Sheldon Junction.

Q. What becomes of the milk from that plant?

A. Well, sometimes there is a car in going to Boston, sometimes there is a truck in there, tank trucks back in—I don't know where it goes—it goes tank trucks right through to Boston.

Q. Do they ever make it up into any milk products at that plant? Do they manufacture any milk products at that plant?

A. No, just milk.

Q. Just a milk plant?

A. Just a milk plant.

Q. There are plants under the Boston Order whose milk is shipped and used as fluid milk for bottling the year round, is that not true?

A. Well, what milk isn't needed, I think they truck to St. Albans and put into powdered milk, but I wouldn't
3311 know—most of it—we are under the Boston Board of Health—every bit of milk we produce has to be fit to go to Boston, if that is what you mean.

Q. No, that isn't what I mean. There are times when your milk goes to Boston and is bottled as fluid milk and distributed as fluid milk, are there not such times?

A. Yes, I think so. I wouldn't know much about that.

Q. Do you know what Equalization is?

A. Oh, yes.

Q. Do you know that that is a process whereby a fluid milk producer has a certain amount of his re-sales return taken away from him and paid to the producer who delivers to a plant that is manufacturing?

A. Yes.

Q. You know that?

A. Well, that is under the Order.

Q. Under the Order?

A. Yes.

Recross examination by Mr. Hanify:

Q. During these years 1941 down to date have you been paid the basic blended price computed by the Boston Milk Administrator—has that been your basic price?

A. Yes, I have been paid quite a few—yes, I have.

Redirect examination by Mrs. Myers:

Q. Do you produce quality milk?

A. The best I can.

Q. Have you had any special premiums paid to you on your milk?

A. Yes, I have had premiums.

Mr. Hanify: Golden Crest?

Mr. Stebbins: I think that's it.

By Mrs. Myers:

Q. What does that mean?

A. That means good milk.

3312 Q. Super-duper?

A. Certain bacteria count, it has to be below a certain bacteria—I cannot tell now.

Recross examination by Mr. Lent:

Q. Do all the producers at that plant get this premium?

A. They do if they produce good milk. If they all—

everyone that sells in that plant that meets with the qualifications, gets the Golden Crest.

Q. Well, are there times when some get it and some don't get it?

A. Oh, yes, there is; sometimes if your bacteria runs up on your count, it's just too bad.

Q. But that producer without high bacteria count, his milk goes into the plant and is mixed up with the other producers' milk, isn't it?

A. I don't know about that. I guess it is, but I think they're striving to keep all milk—get a better grade of milk.

Q. Is that a Re-sale trademark with the Hood Company, the Golden Crest?

A. I think it is.

Redirect examination by Mrs. Myers:

Q. Mr. Stebbins, you think the Federal Milk Regulation is a good thing generally? You understand, do you not, that such an Order can be issued by the Secretary under the law only after proposals made to him and public hearings on those proposals? Who do you think should make those proposals and present the testimony at those hearings?

A. I think that all Creameries, producers of Creameries in the area that are affected, should go.

3313 Q. Well, do you think it would be possible to get the proposals in proper shape for the Secretary, if there were no organization who had men equipped to prepare them? For example, if you and other producers thought that the Order should contain a certain provision, you wouldn't go to the Secretary alone, would you, and say, "I want a hearing on such a provision", and you wouldn't go out and get all the economic information to support it, would you?

A. I probably wouldn't because I know I wouldn't be heard.

Q. Oh, yes, you would be heard if you had the information. Did you not say you go to these hearings and you did not ask to be heard?

A. I might be heard at a hearing, but if a hearing is held,

and I went to Washington—I know something about being heard down there.

Q. Do you know that under the law the Secretary of Agriculture has to conduct public hearings on every proposal and that every interested person, whether he is a Cooperative member, a non-member, a handler, or a member of the Department of Agriculture, has to be heard if he has anything to say on that point?

A. Individuals that are non-members have a chance to vote in all those proceedings.

Q. All those who are not members have a chance to vote in those proceedings?

A. Yes.

Q. In fact it is his duty to vote?

A. Yes.

Q. You don't vote all the time, do you?

A. I vote most of the time. I think—I don't know, I cannot say now.

Q. If I told you that the records of the referendum 3314 officer show that you did not vote in the fall of 1941, that you did not vote in March, 1942, that in December, 1942 you voted in favor of the Order as amended—do you recall that?

A. No, I cannot remember. I thought I voted on all of them.

Q. In 1944 and 1946 the records show that you voted by the Cooperative, the Cooperative voted your vote, do you understand that to be true?

A. Yes.

Q. And the same is true in 1947?

A. Yes.

Q. Do you think it is the duty of your Cooperative to prepare the views of its members and submit them to the Secretary of Agriculture at public hearings?

A. I do.

Q. And who do you think should bear the expense of that, just the members of the Cooperative?

A. I think we pay in enough—I pay in enough for them to represent me.

Q. Do you think that is the feeling of all the other members of the Cooperative?

A. I think the Co-ops—

Q. Do you think that is the feeling of all the members of your Cooperative, that it should not draw from the Government Equalization?

A. I don't know, it's pretty hard for me to tell the feelings of my Cooperative members.

Q. Do you not have meetings to discuss important matters like Cooperative payments?

A. I never have heard it discussed, I don't believe, in an open meeting.

Q. Did you ever bring it up yourself?

A. No.

Q. Do you know the Cooperative couldn't obtain
3315 payments except upon application for such payments to the Secretary, and approval by the Secretary?

A. I know.

Q. So evidently someone in your Cooperative did apply in the name of the Cooperative?

A. Yes.

Q. Therefore, some of the members must desire those payments and approve them?

Mr. Hanify: I object to the question on the ground that the Government is starting to dish out a subsidy, and the Cooperative might apply for it, although the members might personally think the proposition was illegal or improper. They might think if everybody else was to get it, they might get it, too.

Mrs. Myers: There is no question of Government subsidy because the money does not come out of the taxpayers generally, but out of this milk marketing area and out of the producers.

Q. Repeated by reporter: "Therefore, some of the members must desire those payments and approve them"?

A. I wouldn't know.

Mrs. Myers: That is all.

Recross examination by Mr. Lent:

Q. Mr. Stebbins, what is the rate of payment to your Co-operative?

A. What is the rate—how much do I pay in?

Q. No, how much does your Cooperative take out of the pool?

A. I don't know.

Q. If I told you it was a cent and a half, would you say I was wrong?

A. Oh, they take one cent part of the time.

3316 Q. They take one cent part of the time?

A. I think so.

Q. Suppose they didn't take that out of the pool, and you paid it?

A. I wouldn't have to. They have money enough to operate.

Q. Suppose they didn't get any money out of the pool, they would have to get it out of the members, wouldn't they?

A. They do get it out of the members, we pay the dues. They can operate on what we pay them.

Q. You mean they're accumulating more and more money all the time?

A. All the time, yes.

Q. Why do you still pay them dues if the pool payment is enough to finance them?

A. We like a nice Bank account.

Q. How much has it increased in 1947 over 1945?

A. Well I cannot give you the figures. I know it's increased, but I cannot give you the figures.

Q. What dues do you pay the Cooperative?

A. Well, my dues cost me around 75 or \$80. a year. I pay, I think it's two cents, I think, a hundredweight; I won't say for sure.

Q. You pay the Cooperative two cents a hundredweight dues?

A. I think so. I wouldn't say for sure.

Q. How much do they get out of the pool on your membership, one cent?

A. I think so.

Q. And two cents and one cent makes three cents, doesn't it? I guess you and I will agree on that all right.

A. I don't know for sure whether the Northern Farms collect, whether two or three cents.

3317 Q. Aren't you interested?

A. Oh, yes, but they take that, they deduct that and it's all right.

Q. What does the Cooperative payment provision of the Boston Order take out of your milk per hundredweight?

Mr. Hanify: I object to the question because you know it is a complicated mathematical question involving the computation of all the milk in the pool and then dividing it, and it varies from time to time, and the Milk Administrator has to have statisticians to work it out; sometimes it is 1.8 and sometimes it averages 2 points, sometimes it's more or less. I submit it is manifestly unfair for you as a representative of a large Cooperative to expect the ordinary milk producer on the stand to go through the statistics which the Milk Administrator's office does when it has all the figures in front of him.

Mrs. Myers: May I say on this question that the Milk Administrator's office makes those computations and makes them public to everybody in the market who wants them, and ask Mr. Stebbins if he knows that the record in this case now shows how much those deductions have been over a period of years?

Redirect examination by Mrs. Myers:

Q. Did you know that?

A. No, I did not.

Q. Did you know that your attorney obtained those figures from the Milk Administrator and filed them in this case?

A. Yes.

Q. But you did not inquire what they were?

A. No.

Q. You didn't care how much the deduction was?

3318 A. No, we take that—no.

Q. You just object to any deduction?

A. I objected to the deduction taken out of the pool before the price was set. You were talking about deductions.

Q. Would you approve of payments to Cooperatives if the money were collected from the producers after the blended price had been established?

Mr. Hanify: I object.

A. I wouldn't object if they would listen and get the approval of each producer. If a man would sign up to pay them I wouldn't object to it.

Q. Do you know how many producers approved of this method of doing it in the Boston market?

A. The Co-ops you mean?

Q. The Cooperatives and the non-members?

A. I don't know how many.

Q. Did you know that the record in this case shows just those figures? Did you know that the record in this case shows that in the Boston Market in 1941 there were 15,603 producers, that of that number 10,801 belonged to Cooperatives, that 4,802 did not belong to Cooperatives, and that everyone in those was invited to vote, and did you know that this record shows that of that total number of non-members only 843 bothered to vote—

A. That's natural.

Q. That only 843 bothered to vote although you think they all opposed this?

A. Well it's human nature not to vote even if you have a chance to.

3319 Q. Do you know that out of the 843 who voted, only 42 voted against the Order with the Amendments?

A. 42 against the Order?

Q. Of the 843 non-members who voted against the Order as amended with the Cooperative Payment provision, only 42 voted against it?

A. I didn't know it.

Mr. Hanify: Would you stipulate, Mrs. Myers, for the record, no producer was ever given an opportunity to vote on the question of Cooperative Payments solely and exclusively apart from the other provisions of the Order?

Mrs. Myers: I would make the stipulation on the record that no producer was given an opportunity to vote solely on the Cooperative Payment provision because in no Order in the country at any time is any one factor in milk price submitted to vote alone, because all of the factors affect each other, and the Secretary considers if one is eliminated, others will have to be adjusted to give the producer the proper price for that period.

Mr. Hanify: I am content with your statement that the Secretary has never given the producers an opportunity to vote on these provisions for Cooperative payments separately and apart from other provisions of the Order. Now the Secretary's reason was interesting and informative, but the fact is what I am interested in.

Mr. Lent: Mr. Hanify, in your objection to my last attempt to question, you said something about 1.8 and 2 points; you meant cents?

Mr. Hanify: Yes, that's right.

Recross examination by Mr. Lent:

Q. Now, you think the Co-op collects dues from you 3320 of two cents a hundredweight, that is your best recollection, is that right?

A. Yes, that's right, I think so—I am not sure.

Q. And your counsel has informed you that your contributions through the pool to the payments to all Cooperatives at times runs about two cents a hundredweight on your milk, you heard that, didn't you?

A. I heard it, yes.

Q. Now if the Cooperative payments were taken out of the Order and you authorized your Cooperative to collect the dues that it would need, because it was not collecting from the pool, you wouldn't be hardly any better off financially than you are now, would you?

Mr. Hanify: I object.

A. Well I would feel better about it if I knew where it was going.

Q. Well you know your Cooperative collects from the pool, don't you?

A. I know, but I know my Cooperative—I had rather pay them myself than to have them take it out of the pool.

Q. Even though the dollars and cents come out the same?

A. Yes, even though the dollars and cents come out the same, I would rather pay it than to reach behind and take it out of my pocket.

Q. Even though it made no difference in the amount of your milk check?

A. Oh, yes, I would rather pay it.

Q. How much do you think it will cost to take this case to the United States Supreme Court?

A. Oh, I don't know.

3321 Q. You are one of the five parties?

A. Yes.

Q. And you want to pay one-fifth of that expense?

A. Yes.

Q. Just on this matter of principle, that is, no dollars and cents affecting it?

A. Yes, that is the principle—I am against it.

(Recess at noon until 1:30 p. m.)

3322 (Thursday, December 2, 1948, 1:30 p.m.)

MRS. MARGUERITE DENTON called as a witness by the defendant, having been duly cautioned and sworn to testify to the truth, the whole truth and nothing but the truth, deposes and says as follows:

Direct examination by Mrs. Myers:

Q. You are Mrs. Marguerite Denton?

A. I am.

Q. You are the wife of Albert R. Denton?

A. I am.

Q. And you live in Stowe, Vermont?

A. In Morrisville.

Q. Is Stowe your Post Office address?

A. No, Morrisville.

Q. Have you lived on the same farm since before 1941?

A. Yes, ma'am, we have lived there thirty-six years this fall.

Q. In 1941 you were shipping milk under the Boston Milk Order, were you not?

A. Yes.

Q. To what station were you delivering your milk?

A. At Waterbury, the Whiting Company.

Q. And the milk was being shipped in your name, was it not?

A. Yes.

Q. And were payments made to you, in your name?

A. Yes.

Q. Did Mr. Denton have any interest in the milk dealings at that time?

A. Yes, he did.

Q. What was his interest in it?

A. He did all the business.

Q. I mean did you have any formal partnership, or was it you were just husband and wife?

A. Just husband and wife.

Q. And how did it happen that the milk was shipped in your name instead of his?

A. Well, just for personal reasons that we did that.

3323 Q. Have you ever been a member of a Coöperative yourself?

A. No.

Q. Just what connection do you have with the farm or milk business, do you have any control over it, or what do you do about it?

A. Well, we work it together, it's a joint affair.

Q. You make decisions about it jointly?

A. Yes.

Q. You talk everything over between you?

A. Yes.

Q. Your husband is a plaintiff in this case in connection with which these depositions are being taken, that is, Stark vs. Wickard in the first place, now Stark vs. Brannan?

A. I expect he is.

Q. Do you remember when that case was filed?

A. No, I do not.

Q. Do you know anything about how he happened to get into it?

A. No, I do not.

Q. In 1945 did you have the milk production on your farm changed from the name of Mrs. Marguerite Denton to Mr. and Mrs. A. R. Denton?

A. We did.

Q. What was the reason for that change?

A. Well, we just thought we would have it that way because we were joint—everything was in our names, joint account.

Q. Do you know anything at all about this case?

A. No, I do not.

Q. Have you ever talked to your husband about it?

A. No, I never have.

Mrs. Myers: I think we will exense you, Mrs. Denton, and if Mr. Denton will take the stand we will ask him these questions.

ALBERT R. DENTON called as a witness by the defendant, having been duly cautioned and sworn to testify to the truth, the whole truth and nothing but the truth, deposes and says as follows:

Direct examination by Mrs. Myers:

Q. Your name is Albert R. Denton?

A. Right.

Q. You live at Morrisville, Vermont?

A. Right.

Q. You were shipping milk in 1941 to the Whiting Milk Co.?

A. Right.

Q. How long had you been shipping to Whiting at that time?

A. I shipped milk there along about twenty years all told; now it would be ten years or more.

Q. Before 1941?

A. Around ten years I should say.

Q. Did you ever belong to the Mount Mansfield Cooperative?

A. I did.

Q. When was that?

A. That was when it first started, I cannot tell you the year. It was in '17, I cannot give you—

Q. You mean around 1917 or '18?

A. Somewhere around that, it was when the thing was started that I carried it there.

Q. You haven't shipped to Mt. Mansfield since 1935?

A. No.

Q. What do you have with the Whiting Milk Company, a contract or what sort of arrangement for the delivery of milk? Is there a written contract?

A. No.

3325 Q. You just deliver the milk. Is there an oral arrangement that you will deliver regularly to them, or do you just send the milk when—

A. No, no arrangement. We send the milk there and if we want to stop, we can, and there's no contracts.

Q. How did you happen to be a plaintiff in this case?

A. Well, with the Delegates we used to go down to Boston and get together, and figured it was not the right thing, and we figured if there was any case we could get, we would try it.

Q. Who were the Delegates you refer to?

A. Well I couldn't tell you them all, but there was several Delegates, but they were—I know the ones from Waterbury and most of the ones from Randolph, Mr. Starks was one, and Mr. Thompson, and Ward Joslin, Doc Allen—I don't know his first name, from Randolph—there were several others.

Q. They were Delegates from some organization?

A. They were Delegates that went down to bargain about the milk with the Whiting Company.

Q. To bargain with the Whiting Company?

A. To bargain with the Whiting Company, they were the Delegates at that time for the Whiting Company.

Q. Delegates for the Whiting Company?

A. Yes. No, don't get me wrong—to bargain with the Whiting Company.

Q. To represent producers?

A. Yes.

Q. To bargain with Whiting?

A. Yes.

Q. Who elected these Delegates?

3326 A. The farmers, the producers.

Q. What farmers, in a certain area?

A. In a certain area.

Q. Did you have some sort of organization that called a meeting?

A. We had a meeting and the farmers sent these Delegates themselves. They picked out generally three Delegates.

Q. Who called these meetings? Did you have officers of the organization, a farmers' organization?

A. No, there were no officers, they were just the farmers.

Q. Who called the meeting, how did you get the thing started?

A. How would you get the meeting started? We were all producers and we gathered together, and then each farmer that was elected for a Delegate, he went to Boston if he could, if he didn't, he stayed to home.

Q. Well you had to have someone start a meeting, someone had to tell the others when to meet and where to meet. Who did that?

A. Who did that?

Q. Who did that for these meetings? How did you know where to go and when, to elect these Delegates?

A. Well, I don't know how the meeting started in the first place, but at each meeting it was set, the date to meet, after these Delegates came back from Boston, and then the meeting was set for the next time.

Q. Well where were the meetings held?

A. Where were they held?

Q. Yes?

A. In Waterbury.

3327 Q. In a hall?

A. In a hall.

Q. Who owned the hall? Was it a public hall?

A. I don't know if they are, I cannot tell that.

Q. Was it at the Whiting plant?

A. Well, not always.

Q. Were some of them held at the Whiting plant?

A. Some.

Q. You had to have someone tell you where to go—how did you know whether to go to the Whiting plant or some other place?

A. They all knew where to go. I told you, from one meeting to the other they were told.

Q. Who told them at the meeting?

A. Who told them? The ones that went, the Delegates would tell them, if it was me, or Mr. Starks, or Mr. Ward Joslin, he would tell them where the next meeting was going to be.

Q. Have you been a Delegate?

A. I have.

Q. When were you a Delegate last?

A. About five years ago I guess; about five years.

Q. Where did the farmers come from who elected you, were they the farmers who supplied the Whiting plant?

A. They were.

Q. Were there any there who did not supply Whiting?

A. I can't answer that, I couldn't tell.

Q. To your knowledge were there any?

A. I couldn't answer that question direct.

Q. Did someone connected with the Whiting Company call those meetings?

A. No, they did not, the farmers did.

Q. Well to come back to the case, how did you say you got into it, who talked to you about it first, or did
3328 you have the idea yourself of doing it?

A. We had the idea ourselves—not me alone, but

the Delegates that was in Boston, and we got together and found out this case could be carried out.

Q. Was this in 1941?

A. I didn't say it was. I cannot tell you the dates, but I expect it was, or before. This thing has run seven years. I was pretty well posted on it once, but it run seven years and I cannot recollect all these things.

Q. Well who were the Delegates who were in Boston at the time you say this was decided?

A. That I cannot answer.

Q. You were one of them?

A. I wasn't one, Jewett was one, and Mr. Starks here was one.

Q. Where did the Delegates meet in Boston?

A. The Manger Hotel.

Q. Was there anybody from the Whiting Company there?

A. Not there.

Q. Where?

A. All the Delegates meetings are held in the hotel.

Q. Well you went there to bargain with Whiting, did you?

A. Yes.

Q. Wasn't there someone from Whiting there?

A. Yes, there was.

Q. Who was there?

A. Mr. Cooley, I think.

Q. Anybody else?

A. No.

Q. And during the meeting, the exact date of which
3329 you don't recall, it was decided that you should go into a lawsuit, is that right?

A. That's right, that's right.

Q. Who suggested that it might be possible to do that?

A. Who suggested?

Q. Yes?

A. That I cannot answer, who suggested that—I don't know.

Q. Who was the first one you heard talking about it?

A. I cannot answer that question, the first one.

Q. Do you know anybody who talked about it at all at that meeting?

A. Well they all talked about it, the Delegates all talked about it.

Q. Well what did you say about it at that time?

A. I said I was in favor of it.

Q. What were you in favor of, what action?

A. What action?

Q. Yes?

A. Of not liking this pool—there's nothing right about it; there's nothing right about this pool, nothing, there was very few at that time in favor of it.

Q. Very few where?

A. Anywhere that you talked to people, with the farmers.

Q. Where did you talk with people?

A. Morrisville, Stowe and Waterbury.

Q. Did you talk to any people who deliver to dealers other than Hood and Whiting?

A. Oh, yes, I live right in the United Farmers district.

Q. To get back to that meeting in Boston, somebody must have suggested that you file a lawsuit—

A. We couldn't do that.

3330 Mrs. Myers: As far as I am concerned you could.

Mr. Denton: Yes, we did it.

Q. I asked you to explain and you say there was nothing right about the pool?

A. No.

Q. So I say who decided, or how did you decide what to do about it?

A. We talked it over and found out from other people that there could be a suit brought.

Q. You talked it over among yourselves first?

A. That's right.

Q. Did somebody at that meeting suggest you could bring a lawsuit?

A. I cannot answer that.

Q. Who was there beside yourself and this Mr. Jewett, can you remember, and Mr. Cooley?

A. Mr. Cooley wasn't in that meeting.

Q. There was you and Mr. Jewett, who else?

A. Mr. Stark—I cannot tell you—there was always between seventeen and twenty at them meetings.

Q. Where did they come from?

A. From Vermont, Maine, New Hampshire, and I think some in Massachusetts.

Q. Well was that an arrangement whereby there were three Delegates from each Whiting plant?

A. That's right.

Q. And these were the persons who met at that time?

A. Right.

Q. You say that somebody talked to somebody outside and it was decided you could file a lawsuit. Who talked to whom outside?

A. I cannot answer that question.

Q. How did you know there was going to be a lawsuit?

3331 A. I said we talked and we found out that there could be.

Q. How did you find out?

A. We had a Delegate from Maine that was a very smart man, his name was Mr. Stratton, he's dead now—he kept us fellows—coached us on this, and he knew law better than any of us, and he is the one that suggested these things, what they should do.

Q. And was he the one who asked you if you would become a plaintiff in this case?

A. Nobody had to ask me. We was all in this meeting—we was all the plaintiff.

Q. You couldn't be because there are only five in the case.

A. They were elected by the Delegates, the five; I was elected one, and Mr. Stark was.

Q. You were elected to be a party in this case?

A. With Mr. Starks.

Q. He was elected to be a party?

A. That's right.

Q. And you were elected in this meeting in Boston, is that where you were elected?

A. To this suit here?

Q. Yes?

A. Yes.

Q. The Delegates from these different Whiting plants met there in Boston and elected you to be a party to this case?

A. Right.

Q. Was there any record made of that meeting, any list of the persons who were present?

A. I expect probably there was. I don't know.

Q. Did you have a Secretary to the meeting?

A. No.

Q. At that meeting did you make no record of what you did, of what you planned to do? Wasn't anybody authorized to do something special?

A. Mr. Starks and myself and the other three were authorized.

Q. You were the ones authorized to file suit in your own name?

A. We were.

Q. What was going to be the arrangement, were you going to pay any of the costs of this case?

A. Exactly; we were.

Q. Did you know how much it would cost?

A. Do I know?

Q. Yes?

A. I haven't had a bill yet of all of it.

Q. Have you had a bill for part of it?

A. I have had no bill yet. We have the money, but no bills.

Q. Who holds the money?

A. Who holds it?

Q. Yes?

A. I expect that the—that is a question I don't know.

Q. You don't know.

A. But I expect probably it is in a Trust—I expect.

Q. You expect it is in a Trust?

A. Yes.

Q. Who put it in this Trust?

A. Who did?

Q. Yes?

A. Who collected the money?

Q. Yes, who collected the money?

A. We collected it.

Q. Did you collect some money?

A. We collected.

Q. How did you do it?

A. How did we do it? We went around and got the signers and they all signed, and I think it was 1% to fight this case.

Q. 1% of the milk check?

A. One cent on a hundred.

3333 Q. One cent on a hundred?

A. That's right.

Q. When did you get that list?

A. When this started, seven years ago.

Q. In 1941?

A. Yes, if it was 1941 it was started, I cannot tell but it was when it was started.

Q. Yes, it was filed in September, 1941. You got a list of signers at that time?

A. That's right.

Q. Who were the producers shipping to, Whiting?

A. Right.

Q. And they agreed one cent a hundredweight of their milk should be deducted by Whiting before their milk check was sent to them?

A. That's right.

Q. To be used—

A. To fight this case.

Q. To finance this case?

A. Yes.

Q. And was the money held in the meantime by Whiting, or turned over to you or somebody else?

A. It is held by the Whiting Company, because they was authorized to hold that.

Q. Who authorized them, was that the result of the meeting?

A. The meeting that they had, that they hold that money until it was used.

Q. Was that meeting in Boston at which that was decided?

A. I believe it was; I cannot answer that question, whether it was, but I think it was.

Q. How was the money to be expended, if a bill came for lawyers' fees or Court costs or stenographers's fees, would those bills be sent to you, or—

A. They would be sent to me.

3334 Q. To you, yourself?

A. To me, myself.

Q. Not to Mr. Stark?

A. Yes, either one.

Q. Any one of the five?

A. Either one of us.

Q. What do you do then, turn them over to Whiting to be paid out of that money that they hold?

A. Wait until I get you right—

Q. If you get a bill for an attorney's fees, or a stenographer's fee, or a Court fee—

A. Yes?

Q. Would you pay that yourself and then put in a bill for it, or would you turn that bill over to Whiting?

A. I would pay for it myself, or Mr. Starks, either one.

Q. Any one of you would pay it and then you would get repaid out of the fund that was held?

A. No, that money—I can use it to pay for anything, lawyer's fees, or Court fees, or anything. All I have to do is pay that, not out of my own pocket—now get me right—I can use that money any day.

Q. How do you use it? The Company is holding it, isn't it?

A. Yes, the Company is holding it and I can get it.

Q. You can come to them, and get it?

A. Demand it, that's right.

Q. You have never received a bill?

A. No.

Q. No one of the five as far as you know ever has had a bill?

A. No, I cannot answer that question.

Q. If at the time this case is ended you got a bill for \$15,000 would you have plenty of money to pay it?

3335 Mr. Hanify: Objection.

A. That's right, I won't answer that question.

Q. Do you know the answer?

A. No, I don't.

Q. But you wouldn't answer if you did know?

A. Yes, if I knew I might.

Q. And you don't remember anybody who was present in Boston when this was decided, except Mr. Stark, Mr. Jewett and yourself and Mr. Stratton?

A. There was seventeen or twenty there but I don't know their names, I never did.

Q. How long had you known Mr. Stratton?

A. Oh, I couldn't tell you, I don't know how long I knew him.

Q. Well you had known him before 1941?

A. Well I knew him through those Delegate meetings. I cannot tell.

Q. How long had you known Mr. Stark?

A. I don't know, quite a number of years.

Q. You knew him personally?

A. I know him personally.

Q. How about Mr. Stebbins, did you know him before 1941?

A. No.

Q. Or Mr. Walsh?

A. No—I met him, that's all.

Q. Were Mr. Walsh and Mr. Stebbins delegates to these meetings?

A. That I cannot answer.

Q. If they were Hood producers they couldn't be, could they?

A. No.

Q. You heard them testify this morning, didn't you, that they were Hood producers?

A. I don't know. I heard them testify, but I didn't know whose producers they were.

3336 Q. Yes, they testified they were Hood producers. Being Hood producers they couldn't have been elected by the Whiting Company Delegates to prosecute this suit, could they?

A. I cannot answer that question.

Q. There were no Hood people represented at those meetings, were there?

A. No—I don't know if they had meetings the same or not.

Q. I mean of the ones you speak of?

A. No.

Q. You say at one meeting that you speak of particularly in Boston, a group of seventeen or twenty Delegates elected five of you to represent them in this case?

A. Yes.

Q. And two of the five are Hood producers who couldn't have been there, and wouldn't have been elected by Whiting producers?

A. Well, I don't know why they couldn't,——

Q. Was it customary——

A. Why Hood wouldn't have a right in this case as well as anyone.

Q. Oh, that isn't the question. Any producer under the Supreme Court decision in 1944, any producer at all in the Market, has a right to file suit. I am not questioning that, I am questioning your story that five of you who are named plaintiffs, were elected in a meeting which consisted of producers supplying Whiting plants, to represent them in this suit filed against the Secretary of Agriculture, and I want to know how they elected two Hood producers?

A. There were no Hood producers elected in our
3337 meetings.

Q. Who was the attorney who was selected to represent you in this case?

A. Polikoff was the name I believe.

Q. Who selected him?

A. We did.

Q. Who?

A. Who? Now I cannot—this is the group we are talking about—no one person—we talked this over as a group, and I think Mr. Starks probably had as much to do about that as anyone.

Q. Well was that done at this meeting in Boston you speak of?

A. It was done at some of those meetings in Boston; there was a good many of them, they were held for years there.

Q. To discuss this case?

A. Not to discuss this case, but there was a number of meetings held and this was discussed every meeting until it was brought up.

Q. I am right, am I not, you meet regularly for bargaining purposes?

A. That's right, at that time.

Q. What is that, once a month?

A. Once a month.

Q. But in how many of those meetings was there any discussion of this lawsuit?

A. I cannot tell you that; a good many of them.

Q. How many, do you recall?

A. I cannot answer that question, that is beyond my thinking now, back seven years ago—I cannot remember back that far.

Q. Well didn't you regard it as rather an important lawsuit?

A. I think it is, yes, I think it is very important, 3338 but when a thing has gone for seven years and nothing done about it, and you have got to recall all these things—

Q. You say there has been nothing done about it—do you know that case since 1941 has been heard by three District Court Judges, by the Court of Appeals twice, and by the Supreme Court once, and those things have been gone over for a period of years?

A. Yes, they have been just shoved along. There has been nothing done, nothing final about it.

Q. Did you receive reports of these various things?

A. I have.

Q. When you went into this case, were you and the others associated, were you told that there was a question as to whether a producer had a right to bring that case?

A. No, I don't think so.

Q. Did you know that it took about three years in the Courts to find out you could bring the case?

A. I know it took quite a while.

Q. And that that only answered one question? Did you know a milk dealer couldn't bring the same kind of case?

Mr. Hanify: I object to that; it seems to me to call for some knowledge of legal Court opinions, which I do not assume the plaintiff would have; it is a question of law.

Q. Did you know that?

A. No.

Q. Do I understand that you personally do not regard yourself as responsible for any of the expenses of this lawsuit?

3339 Mr. Hanify: I object to that question. There is no evidence along those lines. It is an improper question.

Q. Did you not tell me you would pay nothing out of your own pocket on bills that might come to you?

A. I said we had the money to pay it.

Q. But not your own money?

A. Well some of it is my money.

Q. How much of it is yours?

A. I don't know.

Q. A cent a hundredweight, is that it?

A. Yes.

Q. But otherwise none of your money; you expect to pay none of your own money except what has been deducted from your milk check, is that right?

A. We expect to have enough.

Q. Why do you think that? Have you been given any estimate of what it will cost?

A. No, we have not.

Q. If it should prove that there is not enough in the fund held by Whiting, do you anticipate that Whiting would help you out?

A. Well, we never asked him.

Q. No, I am not asking you that. I am asking you if you would expect it?

A. I haven't got to answer that, have I?

Q. Would you, as a representative of all the producers in the group you say you represent, would you ask Whiting to?

A. No, because we would go right to the group and ask for more donations.

Q. From this particular group?

A. From the group, sure, we would ask for more donations.

3340 Q. How many are there in that group?

A. I cannot tell you. We have got very many names. I cannot tell you how many there is.

Q. Where is that list of names?

A. Where is it?

Q. Yes?

A. I cannot tell you. I have got some to home, and I expect Mr. Starks has got some.

Q. Why is it divided, did some of you collect from some, or what did you do?

A. Mr. Starks belonged to Randolph, and I belong to Waterbury.

Q. Have you received any reports from time to time through the attorneys concerning the progress of this case?

A. We have.

Q. When did you receive reports and what was said?

A. I cannot tell you that, I cannot tell you when we received them. I have got some to home.

Q. You have some to home?

A. Yes.

Q. Are those legal documents, or correspondence?

A. That I cannot recall. It's reports on the lawsuit.

Q. You mean the order of the Court?

A. Yes.

Q. You received a copy of the Supreme Court's opinion?

A. That I cannot tell.

Q. Well what do you know about the status of the case now?

A. What do I know about the case now?

Q. What is happening in it?

A. Well I cannot tell you, I know it's prospering pretty well so far.

Q. In what respect? How?

A. How?

Q. Yes, I mean why do you think it is prospering pretty well?

3341 A. Well I think it is from what little I know about it, I think it's prospering well.

Q. Well what do you know about it?

A. What I have read about it.

Q. Well where did you read about it?

A. I haven't got to answer that question. I read papers.

Q. Oh, you mean from what you read in the newspapers?

A. Well I have other papers besides newspapers.

Q. You mean private papers, or public papers, newspapers, magazines, where?

A. Our lawyer keeps us pretty well posted.

Q. That is what I asked you, you receive reports?

A. Yes.

Q. How often do you receive reports?

A. I cannot tell you that.

Q. Have you had eight reports from them?

A. I don't know.

Q. You have no idea how many you have?

A. No, I haven't no idea.

Q. You have no idea of what the nature of the reports was?

A. It would be hard to tell.

Q. Were these reports addressed to you personally, or to all the parties in the case?

A. I think they're probably addressed to Mr. Sparks and myself personally; I don't know.

Q. And then sent on by him to you?

A. Yes.

Q. And did you send them on to the next man?

A. I send them on to nobody.

3342 Q. You keep them?

A. Yes.

Q. When did you first discuss this case with Mr. Hanify?

A. That I can't tell you exactly.

Q. Well, as far as you recollect?

A. I think in the spring, this spring.

Q. The spring of 1948?

A. That I met him personally.

Q. You had heard from him before that?

A. Yes.

Q. When did you first hear from him?

A. That I can't tell you; I cannot answer that question.

Q. You mean you do not remember?

A. No, no, I don't remember.

Q. You know that is a good answer, don't you, if you don't want to answer, to say you don't remember?

A. I don't remember. I can show you the papers to home, but I don't remember.

Q. You have papers at home, have you?

A. Yes.

Q. If you had them here, would you have any objection to showing them?

Mr. Hanify: Objection. The Government of the United States has got to the point now it thinks it can go into people's files—no attorney-client privilege—advice between attorney and client is now subject to the scrutinization of the Department of Agriculture, is that your position?

Mrs. Myers: As far as I am concerned, I am not governed by anything but the Rules of Federal Civil Procedure, and I haven't the slightest interest in the affairs of these people. If I thought this was an honest lawsuit I would not be making these inquiries at all, and I do not intend
3343 to intrude upon anybody beyond the scope of questioning provided for by law.

A. No.

Q. Did you attend the public hearings on the Boston

Order at which the Cooperative Payment Provisions were considered in 1941?

A. No.

Q. Did you ever see the records of those hearings, ever read any of the testimony?

A. I did.

Q. Where did you see that?

A. They were sent to me.

Q. The public hearing record?

A. Yes.

Q. Who sent them?

A. I don't know, I cannot tell you.

Q. Well who do you think sent them?

A. I don't know, no idea. I suppose most everybody got them.

Q. Were they that thick (indicating)?

A. No, just—

Q. This thick (indicating)?

A. I cannot tell you nothing about it. I know what the public hearing was, and I read it at the time, but I don't know.

Q. You mean you read about it in the paper?

A. No.

Q. Or you read the record?

A. I had a notice of it, there was three or four sheets.

Q. Oh, your had notice of the hearing?

A. Yes.

Q. Did you vote in the referendum that was conducted after those hearings to determine whether the Boston Order as amended by those provisions should become effective?

A. I voted on some and some I didn't.

Q. Did you vote yourself?

A. Yes.

Q. In 1941?

3344 A. I don't know; I cannot tell you when I voted, but I voted on some of them and some I didn't; some I never voted.

Q. You did the voting for your farm?

A. Yes.

Q. How did you sign the ballot when you did vote, how did you sign the ballot, Albert R. Denton?

A. I cannot tell you that.

Q. And, Mr. Denton, in 1941, 1942, 1943 and 1944 and part of 1945, the records of the Milk Market Administrator's Office show that all milk from your farm, or from the farm that you ship from, was in the name of Marguerite Denton?

A. That's right.

Q. And you understand, do you not, that made her, as far as the Order was concerned, the producer of the milk?

Mr. Hanify: Objection.

A. No.

Q. You do not understand that?

A. No.

Q. But you voted, in spite of the fact that she was the one in whose name the milk was shipped?

Mr. Hanify: Do you understand the question, Mr. Denton?

Mr. Denton: I told her I voted. I was the one that voted.

Mrs. Myers: All right.

Cross examination by Mr. Lent:

Q. Mr. Denton, I would like to ask you a few questions. Did your wife vote on any of those ballots?

A. Did she?

Q. Yes?

A. Not to my knowledge.

3345 Q. You know when they vote in a regular election, they have the registration book and they look up and see if you are registered to vote?

A. Yes.

Q. You know in these Milk Order things, when they count the ballots they compare them with the deck sheet of the plant to see whose name the milk is delivered under, because that is the same as a registration book, and if the name is not on the deck sheet, the vote does not count, you understand that, don't you?

A. Yes, I do.

Q. Why did you vote in your own name when the deck sheet showed her name?

A. I never thought anything about that, that's why.

Q. When you had Whiting start deducting this one cent a hundredweight for the expense of this lawsuit, did you get signatures from a number of producers besides the Delegates?

A. I did.

Q. Authorizing this deduction?

A. Authorizing this deduction.

Q. And who signed for your farm?

A. Who signed for my farm?

Q. Yes?

A. I cannot tell you that now, whether me or my wife; it made no difference.

Q. Actually if the milk was delivered in your wife's name, she would have to sign it. If you were Whiting you would not deduct if the signature was different than on the deck sheet—

A. They would from our farm, they know us so well. If

I buy anything on the farm it always has been
3346 charged to me, nothing charged to my wife.

Q. But they take it off your wife's milk check?

A. Sure.

Q. O. K., I can understand that. After this deduction started did you get in payment of your milk one cent less than the Milk Administrator's uniform price?

Mr. Hanify: Objection.

A. I couldn't answer that, it's seven years ago.

Q. Do you know what I mean?

A. I know what you mean, but I cannot answer that; I cannot tell you because for twenty years I have my slips.

Q. This is still going on, isn't it?

A. No, it isn't going on.

Q. Oh, they stopped it?

A. They stopped it, yes.

Q. When did they stop it?

A. I cannot tell you.

Q. How did they come to?

A. We stopped it.

Q. You thought you had enough money?

A. We thought we had enough money.

Q. You don't remember in all the months when it was going on, whether as a result of this deduction you got one cent less than the Milk Administrator's price?

A. I cannot answer that. I wouldn't pay any attention.

Q. Well, you pay some attention to whether you—

A. I look at the milk check.

Q. —when your milk check comes in, as to whether you are being paid the published Milk Administrator's uniform price, don't you, plus or minus butterfat, and plus or minus your freight zone differential—you look at your published figures and see if your check is all right, don't you?

A. Sure.

Q. Wouldn't you know if the one cent was coming off from it?

A. I wouldn't know now.

Q. You wouldn't remember that?

A. I wouldn't remember that, no.

Q. After you got these producers to sign up for this one cent deduction, did they sign all on one list or separate pieces of paper for each producer?

A. We had a form made out and they all signed this list.

Q. Who made out the form?

A. I don't remember who did make out the form. It was just a sheet of paper.

Q. Typewritten?

A. Typewritten, yes, that would tell what it was for, that's all.

Q. Where do you take your milk, Waterbury?

A. I do.

Q. And you are the one got the producers to sign around the Waterbury plant?

A. Yes.

Q. You are the one solicited the signatures?

A. Yes.

Q. You got the form from some place on which they signed?

A. That I cannot tell you, where I got it even; I cannot remember where I got the form.

Q. What did you do with the form after you got all of them to sign?

A. Took it to the Creamery where it was to be deducted and—

Q. And left it there?

A. And left it there, right.

3348 Q. But you said you had it home now, didn't you?

A. No, I didn't say I had that home.

Mr. Lent: I misunderstood you.

Q. You haven't got any duplicate of that list then?

A. No.

Mr. Hanify: The Milk Administrator, I might say for the information of the Government, audited the books of the Whiting Co. and approved of the deductions in question, so the Government knows or ought to know the names of the producers from whom the sums of money were deducted.

Mr. Lent: I am not the Government and I am not interested in that answer.

Mr. Hanify: You might confer with your co-defendant, it would shorten the proceedings so much.

Q. You only have one dairy farm, you and your wife?

A. Yes.

Q. Now, I am interested in this meeting at Boston where you decided to bring this lawsuit. That was a meeting held in the Manger Hotel and you had somewhere between seventeen and twenty Whiting Delegates present at the meeting, as I understand. Who first told you in the meeting about this payment provision that had been put in the Boston Order?

A. I don't know who first told me.

Q. Do you remember anybody from the Whiting Company discussing that payment provision in the meetings that you had with the Whiting representatives?

A. No, I do not.

Q. Do you remember ever discussing that payment provision with any representative of the Whiting Company, outside those meetings?

A. No.

3349 Q. After you and Mr. Stratton and Mr. Stark were elected to represent the Whiting Company producers in this suit, which is the way you have related it, who told you and Mr. Stratton and Mr. Stark about Mr. Walsh and Mr. Stebbins joining with you in this suit? How did that come about?

A. I don't know.

Q. Did you know that when the suit started there were going to be five farmers bring the suit, or did you think three farmers were going to bring it, you and Stratton and Stark?

A. Well, all that I ever knew was Starks and I.

Q. And Stratton?

A. Well, Stratton is dead. He started it.

Q. I am talking about the start of this now?

A. That is all I know about it.

Q. You don't know how these two Hood producers got in there?

A. I don't know a thing about it.

Q. You don't remember who brought you together?

A. No.

Q. Do you remember ever meeting Stebbins or Walsh back in those days?

A. No.

Q. Do you know what Harry Polikoff looks like?

A. Do I?

Q. Yes?

A. No.

Q. You never saw him?

A. Yes, I think I have saw him.

Q. When did you see him?

A. Oh, when this thing first started.

Q. Where?

A. Boston.

3350 Q. Whereabouts in Boston?

A. Oh, I cannot tell you. You have got—I cannot tell you nothing about where in Boston. I cannot tell you where I stayed half the time, if you ask me, down there. You remember this has gone by my memory. I could have told you at one time, but I cannot today.

Q. But I cannot find out what you do remember unless I ask you the questions, can I?

A. Well, you have gone by anything I can remember.

Q. You can say you don't remember, if you don't, but if I don't ask the questions I won't know if you do remember or not. You don't remember who introduced Harry Polikoff to the producers, do you?

A. No.

Q. Do you know where Harry Polikoff had his office at that time?

A. No.

Q. Do you know whether in New England?

A. It might have been in the West, I don't know. Mr. Starks had the handling of that; I didn't.

Q. How many producers delivered to Waterbury?

A. I have no idea whatever. I am not interested in that.

Q. At the time you got this deduction signed?

A. I couldn't tell you. I have no idea how many producers they had; I have no idea.

Q. They elected you their Delegate, didn't they?

A. There was another man at one end. I took one end of the Creamery route, he took the other.

3351 Q. Who was the other Delegate from Waterbury in 1941?

A. There was different ones. I don't know whether Ward Joslin was one down that end, and Rupert Thoneson.

Q. When you got this list signed, or this paper signed for this one cent deduction for this lawsuit, did you solicit the producers at both ends, or just your end?

A. Didn't I just tell you I had just one end?

Q. Now who solicited the other?

A. I just told you, I don't know which one of these others.

Q. But one of the others solicited the other end?

A. Yes.

Q. How many signatures did you get?

A. I cannot tell you that.

Q. What percentage of the total producers delivering to the plant did it represent?

A. About a hundred.

Q. About a hundred signatures?

A. About a hundred per cent.

Q. In 1941 what price did you negotiate when you went to Boston?

A. I don't know.

Q. The Order fixed the prices at that time, didn't it?

A. Probably did—I don't know. It was in the milk strike that started this, started us going to Boston, that is what started the whole thing.

Q. Which milk strike?

A. 1937, wasn't it? 1936 or '7 we didn't get anything.

Q. Then you kept on going after that, every month. Is that still going?

A. I don't know.

Q. When did it stop?

A. I cannot tell you, probably four or five years ago. I don't know whether five or six years.

3352 Q. I am just trying to find out what they were negotiating in 1941 because the Order fixes all the prices, and I am trying to get the whole picture.

A. The milk strike was the starting of this Order and our going.

Q. You had the Order and had had it for several years in 1941, and yet you were going to Boston to negotiate prices with Whiting. I was just trying to get clear in my mind what prices you were negotiating?

A. We got considerably more out of Whiting than we did through the New England Milk Producers Association and New England Dairies, that's why.

Q. You mean in addition to the Order price?

A. Yes.

Mr. Lent: That is all.

Cross examination by Mr. Hanify:

Q. Mr. Denton, with respect to your farm, do I understand that farm is in the joint names of you and your wife, Marguerite Denton?

A. It is.

Q. And that is because it has been your custom in the family to have things in your joint names?

A. That's right.

Q. Do you run the farm?

A. I do.

Q. And do you make arrangements for sale of the milk?

A. I do.

Q. And do you own the cows?

A. Jointly.

Q. With the Missis?

A. Yes.

Q. And for some period of time from 1941 on, as a matter of your own family personal convenience, the milk
3353 check from your farm was made out in her name by the Whiting Company?

A. Right.

Q. After that time went by it went to your joint names?

A. That's right.

Q. But all during the period of time, regardless of how the check was made out, you regarded yourself as one of the joint owners of that farm?

A. Right.

Q. Joint owner of the herd, the man that run the farm and sold the milk?

A. That's right, and bought the cows.

Q. And bought the cows, and during the period from 1941 down to the present time, has milk from your farm been delivered to the Whiting plant at Waterbury for the Boston Market?

A. Yes.

Q. Do you know in approximate pounds how much that has amounted to each year?

A. Why, I have got some idea of what it is.

Q. Well let me see if I can refresh your memory from some figures which I have here. During the period from

August 1st, 1941 through December 31, 1941 did you deliver 61,000 some odd pounds of milk to the Whiting Company at Waterbury for the Boston Market?

A. Yes.

Q. And in the year 1942 did you deliver 184,250 some odd pounds?

A. I did.

Q. And in the year 1943, 183,800 pounds? The same answer?

A. The same answer, I did.

Q. And in the year 1944 did you deliver 180,290 pounds?

3354 A. 1944?

Q. Yes?

A. Right.

Q. And in the year 1945, approximately 194,000 pounds?

A. Right.

Q. And in the year 1946 approximately 180,000 pounds?

A. Right.

Q. And in 1947 138,000 pounds?

A. Right.

Q. And this year up through September 91,500 some odd pounds?

A. Right.

Q. Now you heard counsel for the Government say that she doubted this was an honest lawsuit?

A. Yes.

Q. Do you think it is an honest lawsuit?

A. I do.

Q. Did you authorize this action to be brought?

A. I did.

Q. Are you interested in the prosecution of this action?

A. I am.

Q. Did any personal representative of the Whiting Milk Co., or any handler, ask you to commence this action?

A. No, they did not.

Q. At the outset of this action you were willing to contribute to the cost of the action?

A. I was.

Q. And are you still willing to contribute to it?

A. I am.

Q. And are you anxious for me, as your attorney, to have a day in Court on the question of whether or not this provision in the Order is legal?

A. Yes.

Q. And you think that is all the rights that an honest American citizen can exercise in this day and age, do you?

A. I do.

3355 Recross examination by Mr. Lent:

Q. Did you ever read the Cooperative Payment provision of the Boston Order?

A. I have.

Q. You never heard the testimony that was given in favor of it at the time it was put in the order, did you?

Mr. Lent: Leave the question go. I will come back to it.

Q. You know new provisions are not put in the Order without hearings, don't you?

A. I am very much aware of that.

Q. Did you attend the hearing and hear the testimony on which the Secretary decided to put this provision in the Order?

A. No.

Q. Have you read it since then?

A. I probably have. I imagine I have, but I cannot answer that question. I have read so many of them I cannot tell.

Q. Now, Mr. Denton—

A. Yes?

Q. Unfortunately I had to read that testimony one time, and I read pretty fast because I am a desk man and I am reading things all the time, and it took me about six hours to read it. Don't you think you would remember if you spent six hours reading it?

A. I think—I am not familiar with your question there. I will tell you frankly.

Q. Just to make it absolutely clear to you what I am talk-

ing about, now you see this lady is writing down the questions and answers?

A. Yes.

Q. When they have a hearing on the Order they have a reporter who similarly writes down everything that
3356 is said?

A. I have it.

Q. And then after the meeting it is taken out of the shorthand notes and made into a typewritten transcript, or rewritten on the typewriter and bound in a book, generally with a blue cover and red tape tying it together, and that is what they call a transcript of the hearing?

A. I never read one of those.

Q. You never read one of those?

A. I don't think so.

Q. I doubted if you had but I wanted to make sure.

A. I don't think so.

Q. So you haven't, either by reading that record or having it explained to you by any of the producers who were in favor of these things, you haven't ever had the reasoning on which these payments was based explained to you, have you—you never heard the other side of it?

A. I have heard plenty on the other side. You are coming back to Co-ops, aren't you?

Q. That is all I am talking about?

A. That's the worst thing ever struck this country, one man votes for a thousand—no matter whether the back of him is right or wrong, he votes for him—that is why this lady here, she is just trying to kill them just on account of Co-ops. If you get me started I will tell you quite a lot about them, because these Co-ops—when I can vote for a hundred thousand men, why cannot you carry it? I have got to vote individually. If you are a Co-op, President of
3357 a Cooperative, or Manager, like Selby, you go down there and vote for all those farmers no matter whether they like it or not. Half of the farmers don't know what they get. . .

Q. Farmers join Cooperatives, don't they?

A. Because there are some things all right about Co-ops, I will say there's some things, but when you let one man vote for a thousand there's nothing fair about it.

Q. He cannot vote for a thousand unless they want him to?

A. He cannot? They don't know anything about it.

Q. What I want to know right now is what do you think this Order does to you that you don't like?

A. Why should we divide with our neighbors? If I carry my milk to the Whiting Company, isn't that my business? If my neighbor carries to United Farmers, isn't that his business?

Q. Do you think the Order tells you to take your milk some place else?

A. It can.

Q. How?

A. It doesn't exercise the law—you mean the Milk Order or the Pool now, which are you talking about? We are not talking about the Order—we are talking about the Pool, this lawsuit is Pool. There's nothing fair about that. Why should there be a pool?

Q. Do you understand the pool has nothing to do with the Boston Milk Order?

A. It doesn't have too much.

Q. You think it isn't a part of the Boston Milk Order?

3358 A. It may be a part of it but it isn't a part that does any good.

Recross examination by Mr. Lent:

Q. You don't believe in Equalization?

A. No sir, I don't. I don't believe in one man working twenty-four hours a day, another eight, and dividing with him.

Q. Leaving out Cooperative payments, you don't believe in Milk Pool Equalization?

A. No sir, I do not. That's right straight from the shoulder. I don't believe in it, nor I never did.

Q. I can see that. Do you know who your Congressman is?

A. Know who my Congressman is?

Q. Do you know that Congress put this provision in the Cooperative Act for its members, don't you?

A. I know all about it, probably just as well as you do, and maybe better.

Q. Did you ask him to change it?

Mr. Hanify: Are you still asking him questions pertaining to this litigation, whether or not he has asked his Congressman to change it?

Mr. Lent: I think it is as pertinent as his voluntary statement.

Mr. Hanify: You elicited that.

Mr. Lent: It was entirely unresponsive and we have no way of having it stricken, so I would like to offset it.

Q. You are aware, are you not, that the last time the independent producers had a ballot on the Boston Order, there were 4,000 of them who were eligible to vote independently, and only 800 of the 4,000 voted? Did you know that?

A. How many votes were cast for your President this fall? People don't bother with it. Just as I tell you, they know there's no use; there's no use of me voting independently; there's no use of eight or ten voting against a whole mass, there's no use of that; you might just as well sit still and save your time and breath. You get down there and look at all those, and then the half of them don't know who they voted for. They don't know the man that represented them. I have been in this Co-op you know, I know something about it.

Q: Do you think the Independents are helping the Secretary to determine whether the producers approve or disapprove of the provision under the Order if only 800 out of 4,000 vote?

A. It won't help him, no, and it ain't helping themselves.

(15 minute recess at 2:55 p. m.)

3360 DELBERT O. STARK called as a witness by the defendant, having been duly cautioned and sworn to testify to the truth, the whole truth, and nothing but the truth, deposes and says as follows:

Direct examination by Mrs. Myers:

Q. Your name is Delbert O. Stark?

A. That's right.

Q. And is your residence Randolph, Vermont?

A. That's right.

Q. Well, Mr. Stark, according to the witnesses you are the man who knows about this case. According to your attorney you are the one who has had an unflagging interest in it. Please, you tell us how it got started?

A. Well, back in 1937 when the Order was suspended, I was producing milk and shipping to the Whiting Milk Company, and from each plant under the Suspension of the Order, producers shipping to that plant got together and elected Delegates to go to Boston to bargain with the dealer, and out of those Delegate meetings—of course, the Order was reinstated, but we continued the practice of getting together once a month as a Delegate body and cussing and discussing the milk business, and during the hearings that were being held at different times to amend the Order there was someone selected from the group to testify in those hearings as to our feelings, whether an amendment should be or should not be inserted in the Order from time to time. And during the period the Co-op deduct was contemplated, or the proposed amendment was—the amendment was

3361 proposed, we attended those hearings and opposed having the Co-op deduction inserted with some success for a time; then in 1941 it got by us and was put in as part of the Order. After that happened, as the testimony this morning showed, the group got together and discussed it further to decide what could be done about it. Of course, we did ask advice of some members of the Whiting Milk Company, Dr. Larsen and Mr. Cooley, and they informed us this was not a matter for dealers, that it did not in any way affect their business, it was up to us, whatever we

wanted to do, why we should do, and this is the outcome. That is how the—

Q. You say that for sometime prior to 1941 your groups named representatives to go to the public hearings and testify?

A. That's right.

Q. Who testified in behalf of you and your associates in the 1941 hearings that preceded the Boston Order?

A. I don't know as I remember everybody that testified, but I believe I did in one and I think Nat Divoll from Bel-lows Falls was another, and there were others.

Q. Is that a Whiting plant, Divoll?

A. Yes, ma'am, shipped to North Walpole plant; Mr. Divoll was shipping there.

Q. The meeting at which it was decided that a suit should be filed against the Secretary, can you remember who was there?

A. I can remember several who were there.

3362 Q. Well, you were there?

A. I was there, Mr. Denton was there, Wilbur Thompson was there, Mr. Stratton was there, Lee Lewis, Byron Slip, and a fellow by the name of Clifford Bailey, and there was Wilbert Bowen of Randolph, and there were others there. From Colebrook I think Harry Lang, and I think Wilfred Rainville.

Q. How did the subject first come up for discussion?

A. Of course, we had attended these hearings and opposed the Co-op deduct and after it got by us and got into the Order we were very much disappointed, and not only disappointed but we were really up in arms about it.

Q. Disappointed about what?

A. Disappointed that it was inserted, and we felt it was a very unfair practice. We felt if they could put the Co-op deduct into the Order they could put in a deduct for a Christmas Club, or Community Welfare, or anything else that they wanted to insert—if they could put one in there to take money from us before the price was computed, there was no reason why they couldn't dig in for something else,

and therefore we didn't think it was constitutional and still don't.

Q. Was it explained to you that a provision could be put in the Order only if it complied with the provisions of the Agricultural Marketing Agreement Act of 1937?

A. That's right. I understood enough of the background so that we knew it could be put in, but we didn't think it should be.

3363 Q. Well to get back to the meeting, who first proposed filing of the suit to bring this matter up?

A. Well I was Chairman of that meeting, and Mr. Stratton, as Mr. Denton said, an old fireball—he was an old man but he really knew his onions when it come to litigation, and so forth, and well, we just decided we would do anything about it that we could—if there was a possible chance. Of course, we didn't feel at that time but what any citizen of the United States had a right to be heard in Court, which we found the lower court found we didn't have the right, but the Supreme Court ruled we did. We didn't feel but we could get this thing into court and instead of being seven years about it we would get it over in seven months.

Q. Who first suggested that a law suit would be the way to cure this difficulty?

A. I think Mr. Stratton suggested it.

Q. Was there a vote on the subject of whether or not there should be a lawsuit?

A. That's right, and not only that, but the Delegates were instructed to go back and canvass their respective communities or plants where they shipped milk and get the sentiment of the producers as a whole, before we decided to go ahead with it.

Q. When it was first put to a vote was the vote unanimously in favor of this action?

A. That's right.

Q. Then, as I understand it, the Delegates went
3364 back and each one canvassed producers in his district?

A. That's right.

Q. That is, the Whiting producers?

A. That's right.

Q. And then reported back to Boston to another meeting?

A. We held the next meeting in Colebrook, New Hampshire because it was a little more central for the Maine fellows to come in, and that meeting was held in Colebrook.

Q. Do the same Delegates go to all these meetings for a period, or how?

A. They hadn't all gone—of course, being farmers as we were, it wasn't always possible for one man to get away at all times; there would be two or three elected and if one couldn't go, there would be an alternate.

Q. How long does a Delegate serve?

A. Until they vote somebody else in to take his place.

Q. You mean it might be for a month or a year?

A. It might be for a month or a year, that's right.

Q. So you had a meeting in Colebrook and the Delegates reported back?

A. That's right.

Q. What happened then?

A. Then we decided to file suit.

Q. Who suggested the filing of the suit?

A. The suggestion was made, as I said, by Mr. Stratton, but we did not decide to do it until we got the sentiment of the producers.

Q. All of the producers shipping to Whiting were in favor of such an action?

A. That's right, the very large per cent; there won't be a hundred per cent in favor of anything, but a very, very large majority.

3365. Q. Do you think it is possible for any Milk Order to be written which would be 100% satisfactory to every producer in the Market?

A. No, I don't think that is possible, but may I extend that answer a little farther?

Mrs. Myers: Yes.

A. (continued) I think it would have been possible to have amended the Order and given the producers a chance to vote on the amendment and not on the entire Order. That

is one of the things that has always been a detriment to the independent producer, because of the fact that if he votes against the amendment he has to vote against the entire Order, and each time when I attended the hearings some such amendment would be inserted, like the Co-op deal, at the same time that another amendment to raise the price of milk—you know that is just good logic as far as the fellow who is trying to stick the thing in is concerned, and that is the reason it was done that way, as I see it, and that is a very unfair practice. Of course, it may be legal and all that, but I really question the ethics of it.

Q. Do you feel it would be possible to submit to a vote each amendment offered to the Order and ultimately get an Order?

A. Well if it was not possible I would go without the Order rather than to force every member to vote. If he wishes to vote to raise the price of milk, to vote for something he didn't want, just to get something he did want.

3366 Q. Tell me this, Mr. Stark, are you in favor of a Milk Order?

A. I am in favor of a Milk Order if it is worked so that everyone fares the same, but an Equalization plan where you take away from one and give to another—not only that, but take dues out of me, out of the Pool—as far as Equalization is concerned, I am not finding fault with that, but when you take money out of that to pay somebody else before you get your money back, that isn't Equalization—you are just dipping in there, getting all you want, and then equalizing the plants; whether you take it out for a Co-op or any other cause.

Q. You are in favor of the Equalization Plan generally?

A. I wouldn't object to it, that's right.

Q. What do you think the Equalization Plan does?

A. Well it just gives everyone in the milkshed an equal price for milk whether he sets in a good location or in a poor one.

Q. To do that some handler has to pay in and other handlers have to draw out?

A. Out of the Equalization.

Q. So it is taken away from one and given to the other?

A. Yes.

Q. And you approve of that?

A. That's right.

Q. But you don't approve of taking out money to pay Cooperatives for services they render?

A. Absolutely not because of the fact the Co-ops are allowed the same amount of money to do business as the proprietary dealers or anyone else, and if they aren't efficient enough to run their business so they can exist on that, they better step out and let someone else run it.

Q. You are against Cooperatives?

A. Not necessarily, no.

Q. Do you think it would be desirable to pay to the proprietary dealers the same amount as paid to the operating Co-ops out of the pool?

A. When you start doing that you have just increased the station allowance or what have you. You have just raised their spread. Why not raise their spread and not have it like that. When the money is put in a pool, have it there for the farmer and not to dish out or give it to White, Hood, United Farmers or anyone else.

Q. Do you consider the Cooperatives render any service to the Market as a whole?

A. I consider perhaps they render a service insofar as their membership is concerned. As a whole I don't think they render any service but what we can get from proprietary dealers if we ask for it.

Q. The members of the group with whom you are associated have apparently very definite ideas of what they would like in the Milk Order. Have they ever got together as a group and really presented those views to the Secretary in a public hearing?

A. They have done some testifying but I wouldn't say they have gone so far as to make a lot of recommendations.

Q. Nor have they prepared a great deal of testimony?

A. No. Let me say it has been my experience that

3368 in the testimony to change an order put in by the proprietary creameries, if their producers were interested in that particular phase, they would not object to talking it over with them and giving him a chance to say I think it's all right, or else I don't.

A. A proprietary would not object to talking it over with his producers?

A. That's right.

Q. I don't know as I quite know what you mean by that. Well, to get back to this lawsuit, the Delegates returned to the meeting at Colebrook, New Hampshire and at that meeting it was finally decided a lawsuit should be filed?

A. That's right.

Q. Then what action was authorized at that meeting?

A. Well, the selection of an attorney was authorized at that meeting.

Q. Who selected the attorney and how was he notified—who did that?

A. Well we took counsel with people that were acquainted with attorneys and Mr. Polikoff's name was submitted because of the fact he had had some experience with the New York Order and also some Milk Order in Pennsylvania.

Q. Who suggested his name?

A. I think Dr. Larsen.

Q. Dr. Larsen is who?

A. He was President at that time of the Whiting Milk Company.

Q. Was he at that meeting?

A. He was not at that meeting.

Q. Then the name could not have been submitted
3369 at that meeting?

A. No, I personally talked with Dr. Larsen and a group of other men and got Mr. Polikoff's name.

Q. Then what happened?

A. We asked Mr. Polikoff if he would take the case.

Q. Who asked him?

A. Well I, as Chairman of the Group.

Q. You went to see him, or wrote to him, or what?

A. I wrote to him.

Q. You wrote to Mr. Polikoff?

A. Yes.

Q. And how many knew he had been selected?

A. Well, there was the large group at Colebrook. I had already got his name and that is where I told them what I knew about Mr. Polikoff, and they instructed me to—

Q. You wrote to Mr. Polikoff and what did you say to him?

A. I just asked him if he would take the case.

Q. Then what happened?

A. He met us in Boston.

Q. Met who in Boston?

A. The Delegates Group in Boston.

Q. Was that the full group of Delegates?

A. I wouldn't say so.

Q. Was this a specially selected group of Delegates?

A. It was a small group.

Q. Had they been elected by the meeting just before that to go to Boston to talk with the attorney?

A. That's right.

Q. They were elected by the whole group?

A. I was instructed and given permission by the Delegate Body to make whatever necessary move had to be made, and therefore I did not feel it necessary to get—well, elected by the Delegate body for any special meeting. If I 3370 wanted to call a meeting I called them.

Q. Then actually a group ran the case from that time on?

A. That's right.

Q. Where did you meet Mr. Polikoff in Boston?

A. At Hotel Statler.

Q. Who was present?

A. I for one, Mr. Denton, Mr. Stratton, and who else I couldn't say.

Q. Who introduced you to Mr. Polikoff?

A. Mr. Polikoff was introduced by Dr. Larsen.

Q. At the Statler Hotel?

A. That's right.

Q. Then what happened?

A. Dr. Larsen left and we talked the case over with Mr. Polikoff.

Q. What did you tell him, that you wanted to file a suit against the Secretary of Agriculture, or what?

A. That's right, we told him what our—we asked him what we should do, and he instructed us as an attorney, and we just naturally were just farmers, we were not attorneys.

Q. He advised you to bring a suit?

A. That's right.

Q. How was it determined who should be named as the parties plaintiff in this case?

A. I think Mr. Denton and Mr. Stratton and myself were there and we all agreed to have our names used, and that is how the thing started.

Q. Were you three elected at the meeting before you talked to Mr. Polikoff to be plaintiffs?

A. No, we were not elected to be plaintiffs—we just decided to.

Q. At this meeting?

A. Because Mr. Polikoff informed us there had 3371 to be specific plaintiffs in the case. You couldn't—well, you couldn't take fourteen or fifteen hundred names and have them all on the list—we thought it might be cumbersome.

Q. Then at that meeting was it determined where the case would be brought, in Washington, or where?

A. Mr. Polikoff told us probably where it would have to be brought.

Q. Well did he tell you there was any doubt whether or not the producers had a right to bring suit?

A. He did not. At that time none of us had any inkling but what any American citizen had a right to bring a suit if he had a case.

Q. Then at that meeting it was determined you three should be plaintiffs, and what provision was made for paying the attorney, and did the attorney tell you then what his charges would be?

A. No, he did not.

Q. You didn't ask him how much it would cost?

A. No. I think we did ask him how much it would cost, but we didn't have any idea—whatever his answer was was very meager—because of the fact none of us had any idea this thing was going to drag along for seven years.

Q. He didn't tell you his fees would be a certain amount when he appeared in court, and a certain amount outside?

A. No, he didn't.

Q. So then what did you do at that meeting beyond deciding you three would be plaintiffs and that he would
3372 undertake to represent you?

A. I contacted—some questions were asked this morning—I could have answered them but the fellows who were asked the questions, their memory wasn't very good. Mr. Walsh got mixed up in this case because of the fact that I personally—

Q. We will come to that but I just want to get this in order. At this meeting with Mr. Polikoff, you got that far, you decided he would be retained, you three would be plaintiffs and a suit brought?

A. That's right.

Q. Then what happened?

A. As I said before, I spent a lot of time looking up the different groups, finding out who was interested beside the Whiting group. I contacted Mr. Flynn personally, of White Creek, who was the representative that always attended the hearings for a small group of independent producers at Eagle Bridge, and I think it was out of that contact that Mr. Walsh was asked to serve.

Q. You say you contacted Mr. Flynn?

A. That's right.

Q. What did you say to Mr. Flynn?

A. Well I just asked him if we could get the support of his Cooperative.

Q. What did Mr. Flynn say to you?

A. Mr. Flynn said he would be glad to help morally and any other way possible, financially, but he didn't want personally to get into the litigation because he did not have the time, and he was afraid that perhaps he would have to go

to Washington and didn't have the time to go to Washington.

Q. He said he would be glad to help in every way
3373 and the only reason he wouldn't go in—

A. Was because he wouldn't go in as a party like myself and Mr. Denton and so forth, because he didn't want to get mixed up in the red tape.

Q. Where does Mr. Flynn live?

A. White Creek.

Q. How far is that from here?

A. Well it's about—somewhere in the neighborhood of a hundred miles; at the very south end of the State of Vermont and then just step over the border of New York.

Q. When you went to see Mr. Flynn was there anybody with you?

A. Yes, I took my wife with me.

Q. Anybody else?

A. No.

Q. Would it surprise you to know Mr. Flynn said there was a representative of Whiting Company with you at that time?

A. There might have been a representative of the Whiting Milk Company with me at some time, but not at this particular time.

Q. There was none with you at any time you talked with him about that suit?

A. I don't remember there was.

Q. If Mr. Flynn said there was, you say he was wrong?

A. I say he is mistaken.

Mrs. MYERS: I guess we will have to get hold of Mr. Flynn. He told a different story.

Mr. HANIFY: Have you a signed statement from him, Mrs. Myers?

Mrs. MYERS: Not ready to put in.

Q. Then you went from Mr. Flynn where?

3374 A. I went to see a gentleman in Salem, I don't remember his name.

By Mr. Hanify:

Q. New York?

A. That's right.

By Mrs. Myers:

Q. That's a Hood plant, isn't it?

A. I believe it is.

Q. So you went there to see someone whom you don't know?

A. That's right.

Q. What did you say to him and he to you?

A. I said practically the same thing to him as I did to Mr. Flynn.

Q. What did he say to you?

A. Well, he said he would take it up with his group and let me know.

Q. How did you pick out this man if you didn't know who he was?

A. Well, you see I used to live in North Bennington, right over the border. Mr. Flynn told me about the fellow in Salem—I wasn't acquainted with him until he sent me there.

Q. Why didn't you go to see someone you knew?

A. Because of the fact I didn't know this man in Salem. I knew Mr. Flynn in White Creek, and knew him personally, and Mr. Flynn sent me up there to see this man in Salem.

Q. What happened there?

A. Well I don't remember hearing any more from him.

Q. He didn't become a member of the group that was prosecuting the suit?

A. That's right, he didn't.

Q. How many people did you approach in all?

A. Well, I don't know, I approached a good many.

3375 Q. How many of them decided to go along with you?

A. Well a good many of them pledged their support, but that is as far as it went.

Q. What kind of support were they going to give you?

A. Well, moral and any other support they could.

Q. Financial?

A. Financial, if necessary, yes.

Q. Have you a list of those people?

A. I did have.

Q. Well if they're going to help you, you still have it, don't you?

A. I should have it and possibly I have it. I have got a lot of stuff filed. Of course, I am not a lawyer and I am not prepared to take care of all this.

Q. The first meeting in Boston at which it was decided to do something, took place when? Suit was filed in September, 1941, do you remember when that first meeting took place?

A. Well, very shortly—I don't remember just when, no.

Q. Was it after the Order went into effect?

A. Yes, after the Secretary had allowed the Co-op deduct.

Q. The date of that Order as amended was July 29, 1941, effective August 1, 1941 as the record in the case shows.

A. That I should say was about the very first of it.

Q. So it was around the first of August. Then your second meeting in Colebrook was about when?

A. It was very soon after that.

Q. In August?

A. I should say yes.

Q. And then it was after that you went to see Mr. Flynn?

A. Yes.

3376 Q. And then over to Salem?

A. That's right.

Q. Then where did you go?

A. I probably went home to attend to my own business for a few minutes.

Q. Who else did you talk to about this?

A. Most everybody I met that was interested in milk.

Q. Regardless of whether they were members of Co-operatives or not?

A. That's right. I talked with this gentleman, Mr. Doc Young down in New York State now, he was at that time manager of Northern Farms, and I talked quite lengthily with him about this thing, and Dr. Young agreed with me we were 100% right, but he wouldn't do a thing to throw

it off for the simple reason Northern Farms might benefit from it financially. I have also talked with other Cooperatives felt the same way about it. They were qualified Cooperatives and could get it. They don't believe in the principle, but they could get a little cream free and they wouldn't throw a straw in their way to throw it out.

Q. They have even gone to the public hearings and urged—

A. Some didn't urge—they let the other guy.

Q. They voted for it?

A. I imagine so.

Q. It was not forced on them?

A. Naturally, but the principle of it they didn't believe in.

Q. I think that is very interesting in the way of gossip, but tell us about the ones who became part of this case?

A. I wrote to Mr. Stebbins and asked him what he
3377 could do for us in the north country and I got a nice letter back saying he would go along.

Q. How did you happen to write to Mr. Stebbins?

A. I knew of him, he was a member of the Legislature and quite active in farm affairs, and he is a big farmer; and I knew of him, and therefore I wrote him. I was not personally acquainted with him though. I think he probably has a copy of my letter.

Q. After you left Mr. Flynn did you go to see Mr. Walsh?

A. No, I never met Mr. Walsh until afterward.

Q. After you had done this shopping around did you have another meeting with the attorneys?

A. No.

Q. Do you know how Mr. Walsh and Stebbins got into the case?

A. Yes, I think we submitted their names to Mr. Polikoff and he wrote them to get them to sign a paper authorizing him as attorney to proceed for them. I think that is correct, to the best of my knowledge.

Q. Were you notified when the case was filed?

A. Yes ma'am.

Q. Were you notified what happened afterwards to the case?

A. I was.

Q. What was the first notification, when did you receive the first notice?

A. I don't remember just when it was, but I received the first notice, we got kicked out of court, that was the first notice I got.

Q. Then what, did you have a meeting to determine whether you should go forward with the case?

3378 A. No, we instructed our lawyer to do everything in his power to continue.

Q. What did you hear next?

A. I think we got kicked out the second court.

Q. You think you did?

A. I think that was the information we got.

Q. Then what happened?

A. Well the next I knew Polikoff had gone into the Army and we were without an attorney.

Q. Then what happened?

A. We came to Mr. Hanify.

Q. How did you happen to do that? Did you have another meeting of the plaintiffs, or did somebody else—

A. No, just we had to have another attorney, or leave it idle, and Mr. Hanify's name was suggested and so we wrote him and asked him if he would take the case.

Q. Who suggested Mr. Hanify?

A. I cannot remember.

Q. You cannot remember?

A. No.

Q. You remember who suggested Mr. Polikoff and that was much farther back?

A. That's right, that was the beginning of the case, and I remember that distinctly. Some things we do remember and some we don't. I cannot remember who suggested Mr. Hanify.

Q. The fact you were left high and dry without a lawyer in the lawsuit, would not make enough impression on you so you would remember anything about it?

A. I remember enough about it, but I don't remember who suggested him.

Q. Was the name suggested to you?

A. Yes.

3379 Q. Anybody else with you at the time?

A. I imagine so. I think the Delegate group was together when it happened. I won't say for sure because I cannot remember just when Mr. Hanify was recommended.

Q. You mean the Delegate group that meets regularly in Boston?

A. We did meet.

Q. And the name was suggested during the course of one of those meetings?

A. It could have been.

Q. But you don't know?

A. I wouldn't say positively who suggested it.

Q. Then what did you do? What did the Delegates do? This was suggested to the meeting of the Delegates?

A. I think the plaintiffs wrote to Mr. Hanify and asked if he would take the case.

Q. Who wrote the letter?

A. Well I guess my wife did. She does the typing in our family.

Q. With your signature?

A. My signature was on the one I signed, yes.

Q. And you wrote to Mr. Hanify?

A. That's right.

Q. And you told him what?

A. Asked him if he would take the case.

Q. Did you explain what had happened to the case?

A. Well I didn't have to explain much because I think Mr. Hanify was familiar with it.

Q. He was familiar with the case?

A. I think he was.

Q. What made you think so?

A. Well because it really was common knowledge
3380 to the people who were interested in milk.

Q. How did you know that, that Mr. Hanify was interested in milk?

A. Well because he was suggested to us because he had had some experience in milk, that's the idea.

Q. You did not explain to him anything about your case at all?

A. Mr. Hanify has a copy of my letter there—perhaps if you would like to see it he will put it up as an exhibit. In the letter it tells what I asked him—I cannot remember.

Q. I asked you what you told Mr. Hanify about the case, why you needed a lawyer, what you wanted a lawyer for?

A. Well it was always my opinion you had to have a lawyer to carry on a lawsuit. Not being a lawyer myself and not studying law, I couldn't explain some of the technical matters.

Q. You say Mr. Hanify's name was suggested and you approved of the suggestion because you knew him to be interested in milk?

A. I was told that he had the experience.

Q. Who told you?

A. I told you that I didn't know; I don't remember that. I did at the time.

Q. What kind of experience had you been told he had?

A. He had some experience in Federal Orders.

Q. Did you understand that he would be in favor of the type of case you wanted to continue?

A. After we asked him, he wrote us back and
3381 accepted, and we took it for granted he was interested in that type of case.

Q. And you don't remember where you got the name?

A. I can't tell you who suggested it, no. He might be sitting right there now—I won't say that he said it, but he might have—this thing was discussed with many people.

Q. Was it discussed with many handlers who know about lawyers?

A. No, not many handlers, but I have discussed the thing with Mr. Cooley at length.

Q. So you retained Mr. Hanify?

A. That's right.

Q. Then what happened, what did the producers do then? By the way, did you have any arrangement with him as to costs, who should pay them, or how they should be divided or paid?

A. We haven't paid him yet, but we expect to.

Q. Have you an estimate?

A. Of course, I don't know as I am prepared to state what the estimate will be, what the cost will be.

Q. Have you had any bill covering the activities in the case up to the present time, from the lawyers?

A. You mean bill rendered as to services?

Q. Yes?

A. No, I haven't.

Q. Neither for lawyers' fees or Court costs or stenographic costs?

A. No.

Q. And no estimate as to what the costs may be up to the present time?

A. No.

Q. So you propose to go on with this case without
3382 regard to the costs?

A. That's right.

Q. How is the cost to be defrayed?

A. Well, we will pay some and I have no doubt in my mind but what we can solicit enough money to take care of it. If the Dairy Division doesn't worry about it, we aren't.

Q. Do you think you can get assistance from the Whiting Company?

A. I might if I asked them for it, they're pretty friendly people.

Q. Are they friendly enough to give you a couple cents a hundredweight more on your milk so you don't need to be worried about these deducts?

A. Not if we don't deserve it. They aren't in business to make presents I don't believe.

Q. Have you reason to believe that they would consider that you deserve the money to carry on this lawsuit?

A. I haven't asked them—I don't know.

Q. In the conversations that you had with Mr. Cooley from time to time concerning the case, has that problem come up?

A. It has not.

Q. There has been no discussion whatever as to that?

A. Not to my knowledge.

Q. Or of any support at all?

A. It was explained to us before we started the case in any way they could assist us, but it was not their case, and they did not want any part of it as far as the case was concerned, but it's just a natural thing if a farmer sells his milk to any dealer, if the dealer is interested in the farmer and the farmer is interested in the dealer, to discuss it.

Q. From those discussions did you learn that the Whiting Company was opposed to the Cooperative payment in the Boston Milk Order?

A. They explained to us in no way it affected them.

Q. Did they say they were not opposed to them?

A. They did not say.

Q. Did they say they were opposed to them?

A. No.

Q. Did you say you attended public hearings?

A. I have.

Q. At those public hearings did you ever hear any testimony offered by Mr. Cooley in connection with Cooperative payments?

A. I expect I have. If he testified, I heard him because I was there.

Q. But you did not hear that the Whiting Company was opposed to those payments?

A. No.

Q. Did you ever see the affidavit written by Mr. Cooley and filed in your lawsuit?

A. I haven't seen it.

Q. Did you ever see the one written by Ezra Merrill of the Hood Company and filed in your lawsuit?

A. I haven't seen it, no.

Q. Would it surprise you to learn that those affidavits are mostly devoted to the position of the milk dealers in connection with the Cooperative Payment Provision?

Mr. Hanify: I object. They speak for themselves. The witness hasn't seen them. Whether he is surprised with what they may or may not contain is not material.

3384 By Mr. Hanify:

Mr. Stark, I might say as your counsel I have permitted this examiner to have considerable latitude because the Court will ultimately rule on the admissibility of these questions, and as a consequence thereof it does not behoove me and I am not required to object to these questions. If and when I feel the questions exceed bounds, I will instruct you not to answer the question. Meantime I am making objections only to what I might terminate the most grossly objectionable, but my objections will be made in due course to a great many of these questions. Meantime you answer the question as propounded and the Court will ultimately rule on it, unless I should instruct you not to answer the question.

Mrs. Myers: I object to the statement of Mr. Hanify as representing merely advice to his client which should have been given to him outside of the courtroom, if he desired to give it to him at all, and having no place in the deposition.

A. I do not know as it was.

Q. Do you know who the chief opponents of the Cooperative Payment Provisions of the Boston Milk Order have been from the beginning?

A. I understood them to be the independent producers.

Q. Then you would not expect it to be the two largest handlers in the area, Hood and Whiting?

A. No.

Q. Did you know Mr. Starks when Mr. Stebbins became a member of the American Farmers Cooperative?

A. I didn't, no.

Q. Did you know he was a member?

A. Yes.

3385 Q. Do you still consider him a suitable co-plaintiff in the case?

A. The way he feels about it, I certainly do.

Q. Did you know when Mr. Stratton died?

A. Yes ma'am.

Q. Did anybody notify the attorneys at that time of his death?

A. I don't remember.

Q. You said that you understood that your case had been thrown out the second time. What did you know about the case after that?

A. I knew it went to the Supreme Court.

Q. You know what the decision was in the Supreme Court?

A. Yes.

Q. Then what did you know about it after that? How did you decide what to do next?

A. I didn't decide, I left it to the attorney to decide.

Q. Didn't the attorney ask you if you approved?

A. I think when the decision was handed down our attorney was in the Navy, so, of course, we couldn't contact him at that time.

Q. What was the next you heard about the case?

A. I don't recollect what the next step was.

Q. What is the next thing you recollect about the case?

A. Well this summer I visited with the attorney and—

Q. In Boston?

A. No, in Randolph, and he decided that the thing was going on.

Q. When was that?

A. Sometime this summer, I cannot recall the exact time.

Q. Well, was it June, July or August, in the spring, summer or fall?

A. Well I was of the opinion it was in the summer.

3386 Q. And you were very much interested in the case at that time?

A. I am always interested.

Q. And you had every intention of going on with the case in the summer of 1948?

A. That's right.

Q. And Mr. Hanify came to you and talked to you about it?

A. Yes.

Q. Were you in the milk business in the summer of 1948?

A. I was temporarily out of the milk business during the summer.

Q. When did you go out of the milk business?

A. I think about the first of May. I sold my herd.

Q. How many cows did you have then?

A. Twenty-two milkers.

Q. You shipped to the Boston Market in 1941 under the name of D. O. & M. J. Stark?

A. I think we have always shipped under the name of D. O. & M. J. Stark most of the time.

Q. Is that a partnership?

A. The reason for that is if anything happens to me, my wife can cash the milk checks; otherwise if I die we would have to wait for an administrator to be appointed before she could pay my funeral expenses.

Q. How did you happen to sell your herd?

A. I appraised it to a Jewish fellow who took me up, and I didn't think he was going to—that's the long and short of it—not intentional; I opened my mouth and he asked what

I would take and I thought I had set it high enough
3387 so he wouldn't take it, but he did.

Q. A Jewish fellow?

A. Yes. That is unusual, they usually want you to take less and less, but he didn't.

Q. To whom did you sell your herd?

A. Max Shapiro.

Q. Where is he?

A. In Randolph.

Q. What did you do this summer?

A. What did I do?

Q. Did you have any other business?

A. Yes, I managed the Grain store for the Windsor County Farmers Exchange.

Q. Are you still doing that?

A. When I am able to, yes.

Q. When did you resume shipments of milk?

A. I think in September.

Q. When did you buy the cows?

A. Oh, I bought some last spring—they just freshened this summer.

Q. How many have you now, milking?

A. Oh, we have only got five milking at the present moment.

Q. You intend to have more?

A. Oh, yes, we have more freshening.

Q. You voted in the referendum in June, 1941, did you, Mr. Stark, on the Boston Order with the Co-op payments provision, as amended?

A. I don't remember whether I voted at all. My absent votes have been prompted by the fact you have to vote against the whole Order, the high price of milk, in order to vote at all.

Q. So you never voted?

A. I won't say I never voted. I think there's a record of the times I have voted.

Q. In the referendum of September, 1941 the Referendum Office records show you voted in favor of the Order 3388 as amended at that time. Do you think that is true?

A. Well, if the record shows it I would say it was true.

Q. Do you consider that all non-members of Cooperatives feel the same about the Cooperative payments as you do?

A. I think most non-members feel the same way, and a lot of members feel that way.

Q. Do you know that Cooperative payments provisions are included in other Milk Orders in other areas?

A. I understand they are in the New York area.

Q. Did you know there was a similar provision in the Cincinnati Order?

A. I didn't, no.

Q. Or the Dayton-Springfield?

A. I don't know.

Q. Did you know if you are successful in this case, the Milk Orders in those areas would be affected the same way?

A. I don't know why they shouldn't be.

Q. Even though producers in those areas wanted the Orders?

A. My answer is the same.

Q. So whether the producers in those other areas wanted the Cooperative payment provisions in their Orders or not—

A. I think if they want to give anything to the Co-ops they can take it out of their pocket and hand it to them, not have them take it away from them. It's just the principle of it I object to—it's the principle of taking my money before I get my hands on it.

Q. What about the Income Tax, that is taken out?

A. That is an Income Tax, that tax is for the Government, the support of the Government. We are supposed to have a Free Government but we have to pay taxes to support it. But why should I support your church when I have to pay my own bills in my own church?

Q. Is it your idea the Cooperatives render no service whatsoever in the market?

A. I won't say they don't render any service in the market. If they didn't render any service in the market they wouldn't be in the market, that is my opinion.

Q. Do you think persons who benefit by that service should not do anything toward it?

A. I don't think it benefits non-members to the extent they should ask the non-members to chip in and pay their expenses.

Q. Do you think the non-members should be able to benefit by the service of Cooperatives without any expense to themselves?

A. I have never considered the benefits great enough so but what they could get it out of their own membership.

Q. Do you think that there would ever have been any Federal Milk Order if Cooperatives didn't do the work necessary in the first place?

A. I am not prepared to state. I don't know.

Q. Do you know Dr. Thomas Stitts of the Hood Company?

A. No, I do not.

Q. Did you know there is an affidavit in your case by him?

A. No, I did not.

Q. Then do I understand regardless of what Cooperatives may do that the Secretary of Agriculture considers to be of benefit to all of the producers in the area on the basis of testimony given to him in the Hearing Record, you still consider that no non-member should contribute to the cost of those services?

A. I absolutely feel that way about it.

Q. Do you think that the provision in the Agricultural Marketing Agreement Act that the Secretary cannot issue an Order or an Amendment to an Order without the approval of two-thirds of the producers in the area, is a proper provision under the law?

Mr. Hanify: I object.

A. I don't consider that the referendum is properly conducted when they make everybody vote for an amendment in order to get something that they do want.

Mrs. Myers: I don't think I understand you.

A. (continued) I object to the method they use of getting that two-thirds vote. What I mean, naturally if the Co-ops have got something inserted there that they want, they have power enough through their membership to vote that into the Order, and come hell or high water nobody can keep it out. I don't believe in it.

Q. Do you think the producers who belong to Cooperatives have no rights in the Market?

A. Yes, but I think they should vote individually on these referendums.

Q. Do I understand if the producers who are members of the Cooperatives, voted in the referendum and voted the same way that the Cooperatives vote, you would have no objection to the Cooperative Payment provision?

A. That would change my opinion some.

Q. So you object to the voting by the Cooperative?

A. That's right.

Q. And do you know that provision for voting through

the Cooperative itself is in the Act under which the Order was issued?

A. That is what I understand.

Q. Then a man of your intelligence knows in order to change that you have to change the Act?

A. I have never been elected to Congress.

Q. But you vote for a Congressman, do you not?

A. Yes.

Q. And you know from reading the papers, and so forth, that people do write to their Congressmen and talk to their Congressmen and send lawyers to Washington to talk to them, to explain the things they feel necessary in the law?

A. The Congressman that I vote for never gets to Washington because he is a Democrat and I live in Vermont. We don't have such things as a Democratic Congressman in Vermont—they're all Republican.

Q. Do you think it's your duty to stay quiet, never vote in a referendum, never appear before the Secretary in a Public Hearing, never take up with your Congressman or Senator a change in the law—in other words, instead of doing those things the law provides for, you think you should go into court and see if you can get the Court to throw out those provisions?

A. I have testified in hearings, Mrs. Myers.

3392 Q. You testified very briefly, didn't you?

A. They got the idea how I felt.

Q. But not how you understood about Cooperative service?

A. I think they did, but I don't know if it got into the record or not.

Q. You can see the record at any time you want. You made an affidavit in this case, didn't you, Mr. Stark?

A. In this particular case?

Q. Yes?

A. I think so.

Q. Do you recall what you said?

A. I don't know the words that I said, no. If I made one

it is a matter of record and I suppose you have it and my attorney has it.

Q. By the way, how much do you figure that those deductions have cost you?

A. At the end of 1945 around \$100.00.

Q. From August 1, 1941 to the end of 1945 it cost you about a hundred dollars?

A. Yes, approximately in that neighborhood. It has cost the milkshed millions and millions of dollars.

Q. And because of your principle you would spend what may amount to thousands of dollars in fighting that Order in this case?

A. Yes ma'am, wouldn't you?

Mrs. Myers: No, I think I would take the less costly way myself.

Mr. Stark: If it comes out of your pocket instead of mine, it sounds different.

Mrs. Myers: I am inquiring—

3393 Mr. Stark: I am just making the statement. I know how it feels if it's on the other guy, it always seems different.

Mrs. Myers: I am strictly neutral—I don't care who pays for what in this Market.

Q. Did you have any correspondence or discuss this case with Wilson C. Piper?

A. I might have, but I don't remember. Where was Mr. Piper from, if I may ask?

Q. I am asking you?

A. I cannot remember.

Q. Did you ever have any correspondence with or discuss this case with Mr. Charles Rugg?

A. I might have discussed it with Mr. Rugg, but had no correspondence.

Q. Did you discuss it with Mr. Rugg?

A. I could have.

Q. When did you meet Mr. Rugg?

A. Different times—around several hearings and so forth.

Q. Mr. Rugg is attorney for Hood & Company?

A. I beg your pardon, I have the wrong man, I thought you were talking about someone else.

Q. Whom did you think I was talking about?

A. I thought you were talking about the Hood Production Manager back years ago—that is how I connected that—

Q. Oh, Geyer?

A. Don Geyer, I beg pardon.

Q. Did you discuss this case with Don Geyer?

A. I might have, I met him different times.

Q. You don't remember whether you did or not?

A. I am not positive.

Cross examination by Mr. Lent:

Q. Mr. Stark, I would like to ask a couple questions
3394 on matters that I think relate to this inquiry and which are not quite entirely covered by Mrs. Myers' questions. I am not clear on when you got the idea of getting Hood producers to be plaintiffs in this case along with Whiting producers?

A. Well I got the idea because of the fact that Hood producers had been to Federal hearings and testifying against this Co-op deduct and therefore we took it for granted that they were on our side, and when the thing broke we contacted them to find out if they were willing to help us

Q. What do you mean "when the thing broke"?

A. When the Co-op deduct was inserted in the Federal Order.

Q. Were you in contact with Mr. Polikoff before you were in contact with Mr. Flynn, or afterwards?

A. I would say before.

Q. And did Polikoff suggest to you, and I am not criticising such a suggestion, that it might be a good thing to have some other producers as plaintiffs beside Whiting producers?

A. It could have been. I am not saying it was so, but it could have been.

Q. And you went to Flynn?

A. That's right.

Q. When you went to see Flynn and he said he didn't want to be a plaintiff, but may be Walsh would want to be a plaintiff, why didn't you go to see Walsh?

A. I don't think he said may be Walsh would; he said he would take it up at the first meeting and find out what they would do. That is the way it came about.

3395 Q. Did he notify you after the meeting that Walsh would be a plaintiff?

A. Yes, I have a letter from him to that effect.

Q. That is, Flynn wrote you that Walsh would be a plaintiff?

A. That's right.

Q. And you don't know who these men were that went to see Walsh and first took it up with Walsh?

A. No, I do not. Walsh didn't know their names and I couldn't recollect.

Q. Walsh knew one of their names, that's Gould?

A. I know, but he didn't know the two gentlemen that came and talked with him about the case.

Q. Let's not get the record mixed up here, Mr. Stark. Walsh's testimony was that three men came to talk to him about it, two producers and one Mr. Gould, the field man for Hood?

A. I didn't understand Mr. Gould did anything only brought the gentlemen to Mr. Walsh. I didn't know Mr. Gould talked with him about it.

Q. We won't review Mr. Walsh's testimony any further. He did say more than that according to my recollection. However, Mr. Flynn notified you that Mr. Walsh would be one of the plaintiffs and you had taken it up with Mr. Stebbins and found out he would be one of the plaintiffs. Was there any discussion in a group or separately between the three Whiting plaintiffs and the two Hood plaintiffs as to how the final expense would be shared?

A. No sir.

Q. Never any discussion?

A. No.

3396 Q. How many producers, Whiting producers, signed up for this one cent deduct to pay the expense of this litigation?

A. I don't know how many but the most of them in my area signed up, and what the per cent was in Maine and New Hampshire I cannot state, but I know there was a long list and it was very encouraging.

Q. How long did the deduction continue?

A. I cannot remember now.

Q. Well, can you give me any kind of an idea, was it more than a month?

A. Oh, yes, I should say a lot more than a month.

Q. More than a year?

A. No, I don't think so.

Q. More than six months?

A. No, I don't know just what the length of time was.

Q. You didn't watch your own milk check to see how long it was taken out?

A. Well I was spending my own money then; somebody wasn't taking it away from me.

Mr. Lent: I just asked you a question——

Q. repeated by reporter: "You didn't watch your own milk check to see how long it was taken out"?

A. No, I don't remember how long it was taken out.

Q. But you think it was less than a year?

A. That's right, I do.

Q. And it was started sometime in 1941?

A. That's right, I would say September, 1941.

Q. You think it was as much as six months?

A. I don't know as it was.

3397 Q. It was probably less than that?

A. Could have been.

Q. Do you think there was as many as 300 producers contributing?

A. I would think there was more than that.

Q. As many as 500?

A. I don't know what the number was. I think my attorney can tell you, if you want to——

Q. Well we are interested in asking you, you are the plaintiff.

A. That's right, but I hire an attorney.

Q. Do you know how much money is in this fund?

A. No.

Q. Do you know approximately?

A. No, I don't know as I know approximately.

Q. Well is there as much as \$10,000.00?

A. I don't think so.

Q. As much as \$5,000.00?

A. No.

Q. You mean less than \$5,000.00?

A. I should say so.

Q. Less than \$3,000.00?

A. I wouldn't know if it's less than 3,000.

Q. You said in answer to Mrs. Myers' question you were not worried at all about the expense of this litigation?

A. That's right.

Q. If there's 3,000 or less in this fund, the reasonable expense of this litigation to date would be far in excess of that, you know that, don't you?

A. Yes.

Q. The reason you are not worrying about it is because you think you can go out after the litigation is over, even though you have lost it, and get contributions from other producers to pay it?

A. We have no hopes of losing it.

Q. Suppose you do lose it?

A. It will be lost.

3398 Q. You think then other producers will contribute toward the expense?

A. I think so.

Cross examination by Mr. Hanify:

Q. Mr. Stark, you said that you have kept your property in the joint name of you and your wife for your personal convenience?

A. That's right.

Q. The farm is in your joint names?

A. That's right.

Q. And in order to facilitate your personal affairs you have had the practice of having the milk checks made out in your joint names?

A. That's right.

Q. So that you, Delbert O. Stark, the plaintiff in this case, are the same person as the D. O. Stark that appears on the milk check?

A. That is correct.

Q. And M. J. Stark is your wife?

A. Yes.

Q. Now in round figures do you recall that there was delivered by you to the Whiting Company in the year 1941 for the period August through December, approximately 30,800 pounds of milk?

A. I cannot remember the exact figures, but I have figured it up very recently—somewhere between 123 and 125,000 pounds a year have been shipped since 1941.

Q. That is a short answer. 1941 right down to date, you have been shipping milk to Whiting for the Boston Market at the rate of 125,000 pounds a year?

A. That's right.

Mr. Hanify: I have no further questions.

Mrs. Myers: What was that, 125,000 pounds a year?

Mr. Stark: Approximately.

3399 Recross examination by Mr. Lent:

Q. I don't know how much it has to do with this particular inquiry, but it isn't beyond some of the other questions, and I am very curious about this. Do you think if this Amendment putting Cooperative Payments in the Boston Order in 1941 had been submitted as a separate amendment, and if the producers had all voted on it individually, it would not have passed?

A. This would not have been here at all.

Q. Even though the Cooperatives put on an educational campaign among their own members urging them to vote in favor of it, you really believe that?

A. That's right, that is my firm conviction.

Mr. Lent: You know we tried that in the New York milkshed one time, the major Co-ops let the producers vote individually, but went out and told them how they felt they ought to vote as a matter of Cooperative service to members, and it was surprising when the vote came in, it was no different than if the Cooperatives had voted for their members.

Mr. Stark: You did a good job in telling the producers the real facts in the matter.

Mr. Hanify: Did you further comment on his last question by saying you would not feel personally you ought to pay for the educational campaign which Cooperatives might inaugurate in order to get this deduction?

Mr. Stark: I didn't say that, but I thought it. Independent producers, if they went out and put on a 3400 campaign and learned everybody the facts of the case, probably could get the same result.

Mrs. Myers: That is all.

3401 L. A. COOLEY called as a witness by the defendant, being duly cautioned and sworn to testify to the truth, the whole truth and nothing but the truth, deposes and says as follows:

Direct Examination by Mrs. Myers:

Q. Your name is L. A. Cooley and to satisfy my curiosity what does the "L" stand for?

A. Louis.

Q. You reside in Bradford, Vermont?

A. I do.

Q. You are employed by the Whiting Milk Company?

A. I am.

Q. What is your position?

A. In the Country Department.

Q. Did you hold that same position in 1941?

A. Yes, practically.

Q. And all of the time since?

A. No, no.

Q. What have you done since?

A. From January, 1947 down through the 10th of September, 1948, I was with Vermont Co-op.

Q. That Co-op has been purchased—

A. Since absorbed by the Whiting Company.

Q. That was not a so-called qualified Cooperative?

A. It was not. Qualified from the standpoint of Internal Revenue, but not from the standpoint of the Department of Agriculture.

Q. Under the Milk Order I mean, of course.

A. Yes.

Q. When did you first hear of this case, Mr. Cooley?

A. I first heard of the case when the matter was broached and discussed in these Delegate meetings. Back in 1936, in

3402 December, the Order being under suspension and the milk strike being in full progress, the Whiting Com-

pany at that time realized that it had no contact with its then producers and those who were continuing to come

back because, after all you recall the strike that was called was called because the handlers refused to go along with the

closed shop and have all producers shipping to them forced to join the Cooperative—that was the cause of the strike,

so as those producers began to come back, the Whiting Company went to their various plants and called a meeting and

told the producers, "here, you fellows have come back to us after the strike because you are independent producers,

you feel you would like to stick to us. There's no Federal Order in effect at the moment, and we feel you should have

some voice in the, what the price is going to be", and from that down on right down through I guess 1944 or 1945, those

Delegate meetings were held once a month. Obviously in 1937 the need for bargaining ceased because the Order was

reinstated and there was obviously a known price, but those meetings continued, and at those meetings everything relating

to the milk industry in New England was discussed freely, and with the producers, and they in turn with us,

and obviously part of that—

Q. Excuse me right there, Mr. Cooley, was it part of your duty as manager of the Country Section to attend those meetings?

A. It was.

Q. So you were customarily present?

A. I was, yes.

Q. Were there representatives from the City or
3403 Boston Office of Whiting there?

A. Sometimes yes, and sometimes no.

Q. Which ones in the Boston office were more often present?

A. Sometimes Dr. Larsen was there, occasionally the Treasurer was there, and we might have a man from the Laboratory there if there were quality discussions on, but I was always there because after all it was part of our program in Producer Relationship, but, obviously, as I say, those meetings continued monthly, and after the need for bargaining ceased, there still was considerable interest in all things that affect producers and handlers and Co-ops, and they were all discussed and as various amendments were proposed, for substitution in the Order, and for hearing, those things were discussed, the pros and cons, before the hearings and after the hearings.

Q. Those matters would have to be brought up by someone like yourself familiar with what was going on, wouldn't they?

A. Yes, in part, and in part producers come in and say "I heard so and so talking about this the last time, what's that"? They were matters of mutual interest, and out of that grew, as I say, these monthly discussions, and suddenly there appeared, along I guess in 1938 or 1939 the first time that the matter of the Co-op deduct was proposed—it was not approved as an amendment at the very first hearing—it became a matter of discussion and a matter of live discussion at times, so much so our Delegates of their own free will and accord came in and testified at at least two hearings that I know of, perhaps more than that, so
3404 that—

Q. Were you present at the meeting that was re-

ferred to by Mr. Stark at which the question of taking some action to express their opposition to the Cooperative Payment provision was brought up?

A. Yes, the producers asked—

Q. Who brought that up, which of the producers?

A. Mr. Stratton and Mr. Stark both asked, "What can we do about this? How does it affect you people"? We pointed out to them our cost of the product was in no wise affected after that price had been determined and something was deducted from it then. We further pointed out to them they were the ones affected, and if they wanted to do anything about it, it was up to them, obviously we could take no formal action; that as a part of our Producer Relationship Program with our producers, we obviously would be of what assistance we could, but any move must be initiated by them.

Q. Did you make that statement to them for their information?

A. I made it, and Dr. Larsen made it.

Q. Then what happened?

A. The producers decided among themselves they would try it, and Dr. Larsen and I retired from the meeting—"All right, you can go ahead and do what you want", and they did. We were kept informed as to what they were doing, but when they met to settle the thing we were not there.

Q. Did they come to you for any further advice
3405 as to how they should carry out this project?

A. They came to Dr. Larsen and asked him if he knew of any attorney he could recommend.

Q. Dr. Larsen's position with the Company was what?

A. President. He suggested Mr. Polikoff, among others.

Q. What others did he suggest?

A. Dave Greer was one, and I think there was one other in Boston whose name I cannot recall at the moment, but there were two or three names he mentioned and gave their qualifications, as he saw them.

Q. What happened then that you knew of in connection with the case?

A. Well I don't know what happened then other than they went ahead on their own and started the suit.

Q. Did you know anything about any meetings they had with Whiting producers in the country?

A. Yes.

Q. Did you meet with any of those producers, with any of the plaintiffs?

A. I was present at some of the meetings, yes. That was part of our Producer Relationship Program.

Q. Your Producer Relationship Program is supposed to cover just what, Mr. Cooley?

A. Relationship between our producers and ourselves on every problem that affects us mutually.

Q. But the Cooperative Payment deductions from the Pool did not affect the Whiting Milk Company?

A. It did not affect our cost of product.

Q. So it did not affect you mutually, you and the producers?

A. That is true, but it was one of the things proposed for the matter of hearing, and as I indicated a moment ago, was probably discussed. It happened to be one that affected the producers vitally and they resented it.

Q. What producers did you talk with in company with Mr. Stark concerning supporting this case?

A. I suspect any who happened to be there. I don't recall at the moment. I was present at their Delegates meeting in Boston and it was discussed several months prior to its becoming part of the Order.

Q. Did you visit with him any producers up in the country here?

A. I did not.

Q. Do you know about the deductions from the milk checks of the producers which were made according to the witnesses we have heard here to cover the cost of this case?

A. What do you mean, do I know about it? I know they were made.

Q. You know they were made?

A. Yes.

Q. Do you know when they were started to be made?

A. No, I don't recall at the moment, being six or seven years ago. It is a matter of record. I suspect it was in September but I am not sure, but that is a matter of record and can easily be determined.

Q. You don't know how long it continued?

A. Two or three months, as I recall it. That, too, is a matter of record.

Q. Do you know how much there was in the fund?

A. No, I don't. If you want a guess I should say around, perhaps between four and five hundred; that might 3407 be a little high or a little low. I did know but had no point to follow it up.

Q. Does the Whiting Milk Company expect to contribute to the cost of this case?

A. I suspect back at that time they did. I don't know what their policy is now—I have been with them only since September of this year.

Q. In 1941, of course, is the time I should have referred to. Did they in 1941 expect to contribute to the cost of this case?

A. I think the Whiting Company intended to help them to some extent, yes.

Q. You made an affidavit in the early part of the case, Mr. Cooley?

A. I think I did.

Q. Who asked you to make that affidavit?

A. I don't remember who did, whether Polikoff did or not; perhaps he did. I remember what the affidavit was, as I recall it—you can verify it, you have it there—it was in answer to certain allegations that the Department made through Herbert Forest as to the reasons why the Co-op deduct was sound.

Q. You think you made that at the request of Mr. Polikoff?

A. I think so.

Q. Did you have any discussions with any other persons in the preparation of your affidavit? Did you write that yourself, or did someone else collaborate with you on it?

A. I wrote part of it myself.

Q. Who collaborated with you on the rest?

A. I think Mr. Bronson, Dr. Wesley Bronson.

3408 By Mr. Hanify:

Q. Could you identify him?

A. Yes.

Q. Is he an Economist?

A. Yes.

By Mrs. Myers:

Q. He is employed also by the Whiting Company?

A. Yes.

Q. Have you had any conferences with representatives of Hood with reference to the conduct of this case, Mr. Cooley?

A. I may have had but I don't recall at the moment. I don't know as you call them conferences—I talked it over with Don Geyer now and then. I wouldn't say under oath that I didn't.

Q. Have you had any discussions concerning the case with the attorneys for the plaintiffs?

A. No, other than right now.

Q. What is your interest in the case at the present time?

A. My interest in the case at the present time is that I am a member of the Whiting Milk Company staff and still responsible for the Producer Relationship. I have no interest and never did have any interest in the case.

Cross examination by Mr. Lent:

Q. As far as your testimony shows in this hearing today, it looks like the only interest Whiting had in the case would be to better their Producer Relations by helping their producers who were against the Cooperative payments. Now isn't it a fact that Whiting Milk Company, or the leading individuals in Whiting Milk Company, are completely and definitely against Cooperative payments in the Boston Milk Order?

A. If you will substitute "were" for "are" I will say yes, but I don't know at the moment. Were, yes.

Q. And were at the time when you left the Whiting Milk Co.?

A. That's right.

Q. Which was when?

A. 1947, as a matter of principle, because by the admission of that as an amendment, there was no limitation, no ceiling, the thing could go as far as the activity and lobbying of the Co-ops in Washington pushed it. It could be extended to the point where it could provide field service for Co-ops.

Q. My question was whether the Whiting Milk Company was against the amendment, not why?

A. I am saying yes, and amplifying my answer.

Mr. Lent: Let Mr. Hanify ask you that. I say that is unresponsive. There may be a place for that before this case is over, but it isn't here.

Mr. Cooley: It seems to me there's as much place for that as for a lot there is in here.

Redirect examination by Mrs. Myers:

Q. Tell me, in connection with your duties with Whiting Co. you have to maintain relations with producers other than the group in this case, do you not? You have three in this case, one's dead—two you have?

A. You mean the actual plaintiffs?

Mrs. Myers: Yes.

Mr. Cooley: Yes.

3410 Q. Do you know that all of the producers shipping to the Whiting plants are opposed to the Cooperative Payment provision?

A. No, I don't know that they are, but our activity in that respect did not take into consideration whether they were or were not. Here was a problem that affected producers and we helped them as much as we could. How they finally decided—we were not even there. I don't know how many objected to it and how many approved. The point is that they wanted assistance and we gave it to them.

Q. Nevertheless, you considered the Company would as-

sist this small group in going ahead with what they're doing, even though others shipping to you may have a different view, so you would be really taking sides among your producers?

A. No, I don't construe it that way.

Recross examination by Mr. Lent: #

Q. If it turned out the majority of Whiting producers were against this and Whiting helped the producers finance this fight, as you said up until 1947 at least that they might have been willing to——

A. Perhaps it didn't go clear through 1947, but that is rather immaterial.

Q. (continued) —then how would it be promoting good relations between Whiting and the producers for Whiting to help finance this fight?

A. If the majority of the producers didn't agree about it, why there wouldn't be any fight and therefore, we wouldn't be in it—we wouldn't be here, if they hadn't brought the case, and the fact they brought the case shows the
3411 majority of them felt it was wrong.

Q. I thought you said in answer to Mrs. Myers' question you did not know what proportion of the Whiting producers were in favor of Cooperative payments and what proportion were against it?

A. I did answer it that way.

Q. You don't know what proportion are in favor?

A. I know this, that back in 1941 and the months immediately prior to that, that by far the rank and file were opposed to it. I don't know the exact percentage, whether 90, 80 or 85, but I know the rank and file were opposed, and I know, to the best of my knowledge, that I never heard any of the delegates say, in discussing the thing, that the producers from their particular section felt otherwise.

Q. In the 1946 hearings when the dealers asked to have the Cooperative Payments abolished from the Boston Order, Whiting cooperated with Hood and other dealers in a very extensive and elaborate presentation in the hearing look-

ing toward the amendment of the Order abolishing the Cooperative Payments, did they not?

A. They did.

Q. So that Whiting, if its policy has not changed, is definitely against the Cooperative Payments, not merely to help its producer relations because its producers are against them, but because it is against them itself as a Company, is that not right?

3412 A. If their policy has not changed they're against it in principle, that's right.

Redirect examination by Mrs. Myers:

Q. That is true in 1941 at the time of the public hearings which preceded the amendments to the Boston Order of August 1, 1941?

A. As these matters were discussed in those Delegate meetings, producers obviously asked Whiting how they felt about these things, even though it meant no difference to them in cost of price, and it is true that Whiting Milk Co. told the producers they were opposed to them in principle, and why.

Q. I was referring to the public hearings which preceded the amendment to the Boston Order of August 1, 1941. It is true, is it not, that you yourself appeared as a witness on behalf of the Whiting Milk Company to oppose the proposed Cooperative provision?

A. I think I did.

Q. It is true also, is it not, that Ezra Merrill of Hood & Company appeared as a witness against it and opposed it?

A. I think he did.

Q. Did you and Mr. Merrill cooperate in connection with that opposition?

A. No, we did not.

Cross examination by Mr. Hanify:

Q. Mr. Cooley, since this deposition of yours is to be read in the District Court in Washington, I would like to have you state for the record something of your experience

and background prior to coming to the employment
3413 of the Whiting Milk Company?

Mrs. Myers: I don't have the least objection to that, but his affidavit sets out at great length his entire background as an Economist and Marketing Specialist and everything else.

Mr. Hanify: I can shorten this very materially—would you be willing to stipulate into the record as a part of his examination by me at this time, the affidavit and statements therein?

Mrs. Myers: As to what he is doing and his qualifications?

Mr. Hanify: The entire affidavit.

Mrs. Myers: Oh, I don't see any necessity for it. That is in the record already.

Mr. Hanify: It isn't to the extent that—If you are willing to permit me to offer Mr. Cooley's previous affidavit as evidence in this case when we go to our hearings in Washington, then there will be no point in my asking the questions.

Mrs. Myers: I am not making any stipulation as to what we are going to hearing on. If we got to them, we would have to consider all the affidavits all the way through.

A. I have been in Extension Service as County Agent seven years, Secretary of New Jersey Farm Bureau two years, I was associated with the Director of Markets in Albany, New York for a time I have forgotten the length of
3414 now, I was Director of Markets in the State of Vermont for a period of two and one-half years, I was with the Whiting Milk Company in their Country Department for seventeen years, I was Assistant Manager of Vermont Cooperative Creamery for a year and a half, and I am now in the Country Department of Whiting Milk Company.

Q. And did you graduate from New Jersey Agricultural College with a B.S. Degree?

A. I did.

Q. Having majored in Dairy Husbandry and Agricultural Economics?

A. I did.

Q. And thereafter did Graduate Study in Agricultural Economics in Columbia University?

A. I did.

Q. Are you generally familiar with general economic conditions affecting the Boston Milk Market?

A. I think I am.

Q. Have Cooperative Associations qualified for these Cooperative deductions or Cooperative payments under the Boston Milk Order from 1941 down through the ensuing years after 1941, charged prices for milk sold to other handlers on an inter-handler basis in excess of the minimum prices in the Order adjusted in accordance with recognized allowances in the Order for butterfat content, location of delivery point, and the cost of Country receiving and handling?

3415 Mrs. Myers: That question I object to because it has no relation either to the issues in the case itself, or the purposes for which these depositions are being taken.

A. Yes.

Q. To make sure that the interposition of the objection did not interrupt the continuity of question and answer—

A. The answer was "yes".

Q. Cooperative Associations receiving these payments under the Order, have in fact charged prices in excess of the minimum price fixed in the Order on inter-handler sales of milk to other handlers?

—Mrs. Myers: I object; not relevant to the issues in the case.

A. They have.

Q. Are you familiar with what is known as the base rating system?

Mrs. Myers: I object to that question also because it is not relevant, and also because Mr. Cooley already has

discussed it at great length in the affidavit, already on file in the case.

A. Yes.

Mr. Hanify: I heretofore offered to cut short this examination if you would stipulate I might offer that affidavit in lieu of Mr. Cooley's testimony.

3416 Mrs. Myers: What is the purpose of offering this?

Mr. Hanify: He is familiar with Agricultural Economics and familiar with the Boston Market. There has been in effect, not only in the Boston Market but in the Dairy industry, a system known as the base rating system.

Mrs. Myers: You are here for the purpose of cross-examining the witnesses that have been examined by the Government, not for introducing any other further testimony in connection with the case, and I object to the questions which you are asking Mr. Cooley on the ground that they do not constitute cross-examination.

Mr. Hanify: Let's not encumber the record with altercations between us as to what I may or may not do. I will put the questions and you object to them.

Mrs. Myers: All right, except as I say, it is going to make a very lengthy deposition for the Court to read.

Mr. Hanify: Some of your chatter will make it lengthy.

Mrs. Myers: I expect so, all the way round.

Q. Will you describe what is known as the base rating plan in the dairy industry?

Mrs. Myers: I object because the question does not constitute cross-examination of the witness and is not relevant to the issues in the case.

A. The base rating plan in the dairy industry is a device or a scheme or an arrangement which contemplates evening up production during periods of short production and periods of surplus, and it was accomplished basically by
3417 taking the producer's marketings or deliveries over certain specified periods of time and using that as a basis, and then applying that base to his deliveries during other periods of time. From there on it might vary,

depending upon the plan, but basically it provided for the base amount to be paid for at a price, and with anything over that base amount paid for at another price.

Q. Was the base rating system in effect in the New England milkshed prior to the Federal Order?

A. It was.

Q. Put into effect by certain Cooperatives?

Mrs. Myers: I object to these questions on the same grounds.

A. It was.

Q. Did the original Federal License provide for the base rating plan?

A. The original one in November of 1933 did.

Q. Has it ever been a feature of the Boston Milk Order as promulgated after 1936, to your knowledge?

Mrs. Myers: I object for the same reasons.

A. My knowledge of dates is a little hazy, but I think it disappeared when the Order was reinstated in August, 1937.

Mr. Hanify: Nothing else.

Recross examination by Mr. Lent:

Q: What do you think the base rating plan has to do with Cooperative payments?

A. Why, this, since you bring the question up, the Department and certainly some of the Co-ops attempted to pin their plea for Co-op payments and the legality of them, on that particular paragraph in the Act itself which specified that producer payments could be modified for various reasons, and then they gave the reasons, and finally there was a paragraph, the wording of which I forget, but which covered this so-called rating plan, and I do know for a fact and it came out in the hearing, and it is a matter of general knowledge both in your milkshed and in ours, that the Department, as well as the Co-ops, attempted to use that paragraph as their

right to put this in the Federal Order and have it covered by a so-called Act of Congress.

Mr. Lent: That is all.

(Hearing adjourned at 5:15 p.m.)

3413-3420 STATE OF VERMONT,
Chittenden County, SS.

I, Katharine A. Gardner, a Notary Public within and for the County and State aforesaid, hereby certify that on the 2nd day of December, 1948 I was present at the United States Court House, Burlington, Vermont, for the purpose of taking the depositions of *Marguerite Denton, Albert R. Denton, George Stebbins, Delbert O. Stark, Francis Walsh, and L. A. Cooley* to be used in the *District Court of the United States for the District of Columbia* in the trial of *Civil Action No. 12944 Delbert O. Stark, et al. vs. Charles F. Brannan, Secretary of Agriculture of the United States.*

The plaintiffs were represented by Edward B. Hanify, Esq. of the firm of Ropes, Gray, Best, Coolidge & Rugg, Esqs., 50 Federal Street, Boston, Massachusetts; the Intervenor was represented by Frank B. Lent, Esq., 11 West 42nd Street, New York, N. Y.; and the defendant was represented by Mrs. Mary Connor Myers of the Office of the Solicitor, Department of Agriculture, Washington, D.C.

The witnesses being duly sworn to testify to the truth, were thereupon examined and testified as hereinbefore set forth. The testimony was taken in shorthand and thereafter reduced to typewriting by me.

Witness my hand and official seal in the City of Burlington, State of Vermont, this the 8th day of December A. D. 1948.

KATHARINE A. GARDNER,

[SEAL.]

Notary Public.

(My Commission expires Feb. 10, 1949.)

3421 Filed Dec. 16, 1948. Harry M. Hull, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLUMBIA

Civil Action 12,944

DELBERT O. STARK, ET AL, PLAINTIFFS

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE OF THE
UNITED STATES, DEFENDANT

Deposition of William C. Welden at Boston, Massa-
chusetts, December 8, 1948.

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Pamphlet, Farm Credit Administration

U. S. Department of Agriculture

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3423 Filed Dec. 16, 1948. Harry M. Hull, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLUMBIA

Civil Action 12,944

Published in Clerk's Office Dec. 16, 1948, Harry M. Hull,
Clerk, by George A. Watts, Deputy Clerk.

DELBERT O. STARK, ET AL, PLAINTIFFS

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE OF THE
UNITED STATES, DEFENDANT

Room 1101, Federal Building,
Post Office Square,

Boston, Massachusetts,

Wednesday, December 8, 1948.

Ten a.m.

APPEARANCES:

Edward B. Hanify, Esq., Ropes, Gray, Best, Coolidge & Rugg, 50 Federal Street, Boston, for the Plaintiffs.

Mrs. Mary Connor Myers, Office of the Solicitor, Department of Agriculture, Washington, D. C., for the Defendant.

Deposition of WILLIAM C. WELDEN, a witness of lawful age, taken on behalf of the defendant in the above entitled cause wherein Delbert O. Stark et al. are the plaintiffs and

Charles F. Brannan, Secretary of Agriculture of the 3424 United States, is the defendant, pending in the

District Court of the United States for the District of Columbia, pursuant to agreement, before Edward J. Grace, a Notary Public in and for the Commonwealth of Massachusetts, at Boston, Massachusetts, on the eighth day of December, 1948.

WILLIAM C. WELDEN, a witness of lawful age, being first duly sworn in the above cause, testified on his oath as follows:

Direct examination.

By Mrs. Myers:

Q. Your name is William C. Welden?

A. That is right.

Q. What is your address, Mr. Welden?

A. 14 Newton road, West Medford, Massachusetts.

Q. You are presently employed by the H. P. Hood & Sons, Incorporated?

A. That is correct.

Q. A milk handler in the Boston marketing area?

A. That is a handler in the Boston marketing area.

Q. In what capacity are you employed by that company?

A. I am employed as an economist and as the director of government relations.

Q. I thought Mr. Merrill was director of government relations?

A. That arrangement was changed in August, 1947.

3425 Q. In what capacity were you employed when you

first entered there, when you first went with Hood & Sons?

A. I was employed as a member of the staff in Mr. Merrill's department which was at that time Government Relations and Sales Research.

Q. You went with Hood & Company in October, 1945, did you not?

A. That is correct.

Q. Prior to entering the employ of Hood & Sons, what was your employment?

A. I had been employed by the Dairy Branch of the Production and Marketing Administration, prior to October, 1945. I had held that position since October, 1942.

Q. Prior to October, 1942, you were on special details with the Dairy Division, were you not, for the Farm Credit Administration?

A. From about the middle of May, 1942, until October, 1942, I was officially on the staff of the Farm Credit Administration but on loan to the Dairy Branch in what was then the War Food Administration, I believe.

Q. After your resignation from the Department of Agriculture, you were consultant with the Dairy Division for a period from October 19, 1946 to July 27, 1947, were you not?

A. I had an appointment as consultant with the United States Department of Agriculture. My memory is a little dim on the dates. As I recall, that appointment was terminated in May or June of 1946.

3426 Q. Well, if I tell you that your personnel records show July 27, 1947 as the date of termination and October 19, 1946 as the date the appointment became effective, do you think that would be right?

Mr. Hanify: Objection.

A. I would think it would not be right.

Q. We will refer to the Dairy Division, that is the Dairy Branch I think it is now, and that will refer to the Dairy Division and the various names it has had during the time you were employed there, instead of recalling whether it

was the Dairy Division or the Dairy Branch, it was all the same thing. While you were employed by the Dairy Branch you worked under the direction of Dr. Thomas G. Stitts, did you not?

A. That is correct.

Q. Dr. Stitts is now an employee of Hood & Sons, Incorporated?

A. That is right.

Q. Do you recall when he entered the employ of Hood & Sons, Incorporated?

A. To the best of my recollection it was in May, 1946.

Q. In what capacity is Dr. Stitts employed by Hood & Sons, Incorporated?

A. Dr. Stitts is in charge of what is known as the Dairy Products Supply Department and also director of public policy.

Q. Have you worked closely with Dr. Stitts since 3427 you have been with Hood & Sons?

A. That is difficult to answer categorically. I have worked with him on a number of problems. I am not employed by him nor under his supervision, nor is he under mine. We are in different departments of the company.

Q. As head of Government Relations Department, you would have considerable to do with the director of public policy, would you not?

A. I do not know what the meaning of "considerable to do" is in your mind. I am certainly generally familiar with what he is doing as an economist for the company. I am called in at times to do some staff work for him, but I am not in that department so that our relationship in that respect is an informal one. I am generally familiar with what he is doing.

Q. During the time you were in the Dairy Branch of the Department of Agriculture, in the course of your duties you became familiar with the testimony offered in various public hearings held under the agriculture marketing agreement act of 1937 with relation to Order No. 4, the order regulating the marketing of milk in the Boston area and

particularly the hearings as a result of which the so-called cooperative payment provisions were added to the order?

Mr. Hanify: Objection.

The Witness: Is it all right to answer?

3428 Mrs. Myers. Yes.

A. Not too familiar. I was not in the Dairy Branch at the time the cooperative payments provisions under the Boston order were promulgated, so I have no specific occasion to go back and examine the hearing records on which they were based.

Q. After the employment of the Dairy Branch in October, 1942, in September, 1942, there was a hearing on a proposal, on several proposals, one of which was by four handlers to delete the cooperative payment provisions from the order. Those proposals were under consideration, were they not, in the fall of 1942. That was after you left the employment of the Dairy Branch.

Mr. Hanify: Objection.

A. It was logical to assume they were. I have no recollection of the consideration.

Q. Have you any recollection of any consideration by the director of the Dairy Branch and yourself as assistant director of testimony concerning the cooperative payment provisions in the Boston order?

Mr. Hanify: Objection.

A. My recollection is that during the time I was there there were two or three procedural amendments, changes in the cooperative payment provisions, but none that I
3429 recall which raised in broad form the basic issue of whether or not there should be cooperative payments. One that sticks in my mind most clearly is the question of how the marketing administrator handled the claims which the cooperatives filed for their payments.

Q. Apparently you refer to one of the proposals that was made in connection with a September, 1942 hearing which was that the Secretary shall prescribe how payments

may be used, provide for auditing expenditures of such payments, disallow expenditures not provided for, and so forth.

Mr. Hanify: Objection.

A. Yes. And my recollection is I do not recall the date, but there was quite a little discussion on the time of filing and the payments, what form that claim was to be in, and what could be done with respect to duplicating claims covering the same producer.

Q. Have you any recollection in connection with that same hearing record that there was a proposal by the Dairy Branch itself in case of milk that was sold to proprietary handlers from a plant of a cooperative in which there was milk received from a proprietary handler of another cooperative that such other milk shall be considered to have been used to supply such sales before the cooperative's own milk is available?

3430 Mr. Hanify: Objection.

A. Now you bring up the point I remember, some discussion along the general line. I have no detailed recollection of that.

Q. But you have no recollection—have you finished?

A. The word "issue" is the final word.

Q. But you have no recollection at all that that same hearing covered a proposal by four handlers to delete section 9 from the order, the section that has to do with cooperative payments?

Mr. Hanify: Objection.

A. No, I have no specific recollection of that issue arising.

Q. What exactly were your duties as assistant director of the Dairy Branch, Mr. Welden?

A. Those vary a little bit with time, Mrs. Myers.

Q. Let us begin with 1942 when you entered the employ of the Dairy Branch. Did you have the title of assistant director at that time?

A. I had the title of assistant chief, I believe it was called,

at that time, which amounted to the same thing. Beginning some time in October, 1942, from May, 1942 until October, 1942, as I indicated, I was on loan or assignment from the Farm Credit Administration.

Q. May I interrupt you there? What work were you doing on that special assignment?

A. One of the primary jobs there at that time 3431 was handling the relationships of the dairy industry, both production and manufacturing and distribution with O D T and approximately six weeks of that time was consumed in a series of field meetings with O D T, during which they were trying to get under way some of their wartime conservation measures.

During the balance of the time I was engaged in general work with Dr. Stitts on the problems that were coming up. At those times the problems involved the impact of O P A price controls on the dairy industry. They involved an attempt to recruit a staff to handle some of the work we knew was coming. They involved quite a lot of work in appraising the general dairy situation to try to determine what type of controls we were going to need in order to manage the dairy industry during the war. A minor part was that I generally familiarized myself with the procedures and techniques involved in marketing agreements and orders. Dr. Herbert L. Forest was still there a considerable amount of that time so that we were engaged during the early days in gradually working ourselves into some of the more technical procedural problems involving the marketing orders.

Q. In this preliminary work you apparently were doing in connection with the milk marketing orders, were you 3432 required to consider the amendments then pending, the proposed amendments then pending to the Boston milk order?

A. My recollection is a little dim on specific functions during that time, but I would have been required to pass on the proposed action to be taken on the orders beginning in October, 1942, if I had been in town at the time the discussion came to that particular level.

Q. When you say "pass on the action taken," what does that mean? What was submitted to you?

Mr. Hanify: Objection.

A. That means to read over and perhaps confer with members of the staff in regard to the memoranda accompanying proposed revisions or amendments and to initial those documents and pass them on to the chief of the Dairy Division.

Q. The memoranda and reports that were submitted to you contained a review of the testimony in the hearing records and the expressions of opinion concerning the proposals made, whether they should become effective or not, did they not?

Mr. Hanify: Objection.

A. In the normal course of events they would have. With respect to this particular one, I do not recall whether I so initialed it or not or whether I might be out of town when it would have come to that particular level.

Q. Do you mean, Mr. Welden, you read and initialed reports and memoranda and sent them on to Dr. Stitts 3433 when you had known nothing whatsoever about what those reports and memoranda were going to contain before they were put on your desk?

Mr. Hanify: Objection.

A. No, I do not mean that at all. I feel I have indicated that.

Q. When were you chief of the fluid milk division?

A. I do not recall the exact date on which the specific functions were assigned in the Dairy Branch. I believe it would have been after October, 1942, and the very early part of 1943 when after some conference with the head of the Food Distribution Administration an organization chart was developed and an announcement made concerning the staff in the Dairy Branch.

Q. That change did not really affect your duties, did it? You had all the same duties as you had before and after-

wards. Was that change a change in the name of your position?

Mr. Hanify: Objection.

A. It was a formalizing of the organization plans for the Dairy Branch which Dr. Stitts had developed.

Q. As a matter of fact, during the period you were employed in the Dairy Branch, you were the chief assistant and adviser to Dr. Stitts and actually everything of any importance went over your desk before it went to him. Is that not so?

Mr. Hanify: Objection.

A. With respect to most dairy matters and all fluid milk matters, that was true with the one proviso that our duties during that time involved quite a bit of out-of-town activities so that important matters would not be held until I returned in all cases, they would have gone on to Dr. Stitts and would have been reviewed by some one ordinarily working under me in my absence from the city.

Q. And when Dr. Stitts was absent from his office, you generally functioned, did you not, as director or chief of the Dairy Branch, chief the title happened to be at the time?

A. There is just one qualification there, at that time and beginning with Dr. Stitts' tenure in the Dairy Branch, it was the Dairy and Poultry Branch, there was a parallel assistant chief on the poultry side, and on some occasions I would be acting chief when Dr. Stitts was out of town. On other occasions, I was acting chief.

Q. I understand you have no recollection of the report that was made on the proposal of the four handlers to delete the cooperative payment proviso that was heard September, 1942? I may say that report was dated December 28, 1942.

Mr. Hanify: Objection.

A. I have no recollection of having been an integral part at all of that decision. I may well have initialed the report.

I have no recollection of the issue and I am not familiar with the decision we made on it.

3435. Q. Then you have no recollection of a report that was dated March 18, 1944 in which it was concluded that the testimony on the proposal to eliminate the payment plan did not show that the considerations previously had been erroneous or that any changes should be made?

Mr. Hanify: Objection.

A. No, I have no specific recollection of that report.

Q. Do you have any recollection of any discussion of that decision?

Mr. Hanify: Objection.

A. No, I cannot recall that. That decision does not stir my recollection in my mind at all.

Q. That report was revised April 22, 1944. With reference to cooperative payment provision proposals. It concluded that .

“Numerous activities of the producers cooperative marketing organizations are desirable such as presentation of evidence at hearings, consent, the needs of producers with respect to prices for milk and differentials to reflect handling costs, to furnish an adequate base for constructive amendments to the order, study and research with respect to marketing problems common to all producers, educational activities designed to give producers a better understanding of the order, insurance to producers generally of a market for their
3436 milk, assumption of responsibility for a reserve of milk to meet irregular needs of distributors which is essential in a market which provides market-wide equalization among all producers of the total value of the milk.”

Do you have any recollection of that report?

Mr. Hanify: Objection.

A. That language, the general tone of the language, of course, is familiar to me. It appears in a lot of the reports, something similar to it, the language of a lot of orders and

so on. I have no specific recollection of the report dated April, 1944.

Q. Do you have a recollection that as a result of proposals in hearings or proposals about 1944, in April it was decided the cooperative payment provision should not be eliminated from the Boston milk order?

Mr. Hanify: Objection.

A. No. My recollection, as I indicated awhile ago, does not encompass the fact that a basic decision was made at the time we were in the Dairy Branch or at the time I was charged with the operation of the fluid marketing orders, taking down any hearing evidence as to whether the cooperative payments should be abandoned or continued in Federal Order No. 4.

Q. If such memoranda and reports were prepared 3437 and submitted to Dr. Stitts, that view would have to be examined by you and initialed by you would it not?

Mr. Hanify: Objection.

A. Under ordinary circumstances, that is true. There is certainly a chance that in that particular one I would not have read it or passed on it or initialed it.

Q. If that were true, that would mean you knew nothing whatsoever about it?

Mr. Hanify: Objection.

A. Not necessarily. I would have been generally familiar with what was going on in the dairy side and particularly the fluid milk part of the Dairy and Poultry Branch.

The number of things going on, however, in the dairy side, in the noteworthy part of it, were so extremely numerous at that time that this might be one of 200 things that were handled in the course of a day or week, so that it does not strike a responsive chord in my memory at all.

Q. It is true, during the entire period you were with the Dairy Branch, the subject of the propriety, the legality and the necessity for cooperative payment provisions in milk orders was under almost constant discussion?

Mr. Hanify: Objection.

A. Why, certainly. It was not under constant discussion, Mrs. Myers. There was quite a lot of discussion
3438 of it, certainly. In the case of the Boston order at that time there was much more discussion of the qualification of two or three different cooperatives pursuant to that section of the order than there was of that section of the order itself. During the course of that period the only issue discussed in New York other than the qualification of some particular organizations was, whether or not there should be a hearing on it. As I recall, there was a hearing on which a decision had not been made and it was hanging fire all of that time.

Q. In New York?

A. Yes.

Q. During the period of your employment similar provisions to those in the Boston order concerning cooperative payments were incorporated in other milk orders. Is that not true?

A. That is true, such provisions were incorporated in the orders for Dayton and Cincinnati, I believe.

Q. You took a particularly active part, did you not, in the promulgation of the Cincinnati milk order?

Mr. Hanify: Objection.

A. I do not know what you mean by "particularly active." I was generally familiar with the thing. I do not recall I attended the hearing.

Q. By "particularly active," I mean that I understand from men who worked under you that you were kept advised concerning all of the discussions in that case and you
3439 passed on the final report and approved the final order.

Mr. Hanify: Objection.

A. I was generally familiar with it and their application for a hearing to consider cooperative payments. I do not recall specifically whether I read a paper on that report and initialed it, but I might well have. I certainly recall

the issue and the fact that we did recommend to the Secretary such a provision be incorporated. Whether I recommended it specifically, or it went through me in the normal course of events or I was out of town at the time it was done, I am not too sure.

Q. Do you think you could not recall that?

A. I know it was done with my full knowledge and so on.

Q. And your approval?

Mr. Hanify: Objection.

A. Why, certainly I was familiar with what was being done. As I recall, I entered no objection whatsoever. I do not recall whether I signed the specific report or not.

Q. Do you recall the affidavit of Dr. Stitts that was made and filed in this particular case.

A. Yes, I do. I recall the preparation of it. I do not know what specific date it was filed on or what changes were made after I saw it.

Q. It was prepared in 1945, but it was not filed until October, 1946. Do you recall that on or about February 14, 1945, you participated in a conference with Dr. Stitts 3440 and myself concerning the contents of a rough draft of that affidavit?

A. I remember the conference. My memory on dates would not be quite that specific. As I recall, it was about that time.

Q. My memory on dates was not that specific, but I kept an office diary and checked on the day. Do you recall any of the discussion of the cooperative payment provisions at that time?

A. Well, in the most general way, Mrs. Myers.

Q. Do you recall that the three of us discussed the various facts that were set forth in that affidavit and also various expert opinions?

A. That is correct, yes.

Q. And that you agreed with the opinion expressed by Dr. Stitts?

Mr. Hanify: Objection.

A. Well, I do not know that I was called on to agree or disagree in that particular way. I think we agreed, if my memory serves me correctly, that the statements we had made there were made in the affidavit were in my opinion a fairly accurate reflection of Dr. Stitts' general views on milk marketing cooperatives and cooperatives generally.

Q. I am sure you do not recall the exact date, but I will ask you. Do you recall on May 29, 1945 I myself delivered to you the final draft of Dr. Stitts' affidavit for your examination to be handed by you to him for signature if you found nothing in it to criticize adversely.

Mr. Hanify: Objection.

3441 A. I recall your bringing the affidavit up and asking me to look it over and pass it on to Dr. Stitts.

Q. You did pass it on to Dr. Stitts?

A. I did as I recall it, yes.

Q. Without any changes?

Mr. Hanify: Objection.

A. I do not recall any major changes certainly.

Q. Do you recall the affidavit of Ezra Merrill, at that time government relations director for H. P. Hood & Sons Incorporated, made on November 12, 1946 and filed on behalf of the plaintiffs in this case?

A. Yes, I recall that affidavit.

Q. You were employed by Hood & Sons Incorporated at that time, were you not?

A. That is correct.

Q. Did you participate in the preparation of that affidavit?

A. As a member of Mr. Merrill's staff I would have to get together for him any facts pertaining to this change he requested me, and as I recall, he did. We did have some conference on that subject in which I participated.

Q. In fact, did you not prepare the outline of the whole Merrill affidavit?

Mr. Hanify: Objection.

A. No, I do not believe that would be a correct statement, a correct fact, Mrs. Myers. No, I cannot say that.

Q. I asked you that because it was my understand-
3442 ing in April, 1947, you made a statement to that effect in the course of a conversation with a member of the Dairy Branch, and that the outline had been turned over to Mr. Hanify.

Mr. Hanify: Objection.

A. I do not recall having made any such statement. Certainly this much is correct, Mr. Merrill took a leading part, by far the major part in the job of preparing that affidavit and my part in it was entirely as a member of his staff, a member of the Hood Company, so that it is in every respect his affidavit. My work would have been pursuant to his instruction, since I was employed by him.

Q. Did you agree with the facts and opinions set out in that affidavit?

Mr. Hanify: Objection.

A. I do not quite know how to answer that. I do not think I found myself in substantial disagreement with any of the things that went in there. I do not think I was called on particularly to agree or disagree.

Q. You did consider the entire affidavit, did you not, at the time?

Mr. Hanify: Objection.

A. I would have read—I do not recall specifically having done so, I do not know that I was called on to pass on it, approve or disapprove the entire affidavit, Mrs. Myers.

3443 Q. Did you succeed Mr. Merrill as head of the Government Relations Division?

A. Yes, I did.

Q. Then at the time that the affidavit was made, you were a responsible member of his staff, were you not, one on whom he relied?

Mr. Hanify: Objection.

A. That is correct.

Q. How many members of his staff were in that division?

A. Five, I believe, five in government relations; two professional members of the staff in government relations, and the others were in sales research.

Q. Did he ask your opinion concerning the contents of that affidavit?

Mr. Hanify: Objection.

A. Not in any such categorical fashion as that.

Q. I would not expect that. I would ask you about specific matters he was considering at the moment, I would assume he would ask you, is that so? You do not take a whole affidavit out of air and then write it out and say, "How do you like this?"

A. Well, that is certainly correct. I think you have to appreciate, however, that Mr. Merrill according to my understanding had quite an extended connection with this case so that his views on cooperative payments under the Boston order were to a large extent and certainly could well have been developed entirely independent of any views I might have had. My position on his staff would have meant generally that we would have attempted to compromise any conflicts in view between the two of us. That does not mean in any sense that Mr. Merrill's affidavit recommends my views of this matter or that I was called on or did agree and concur in every respect with everything that was in the affidavit.

Q. I do not know about Government Relations Division of industry. Just what do you do? What did you as assistant to Mr. Merrill? What do you do now as Government Relations chief?

A. My specific job is to handle the problems of the company and the relationships of the company with respect to the Federal milk marketing orders and the six state milk control boards under which we operate in New England and to keep abreast of the study and try to interpret for them the changes in the various economic regulations in any way affecting the operations of our company. That

involves responsibility for all of the relations with Mr. Aplin's office.

Q. Mr. Aplin is the market administrator in Boston, is he not?

A. That is correct. It also involves relationships with the New York market administrator's office. There are relationships with the Dairy Branch in Washington. Of course, a very considerable amount of time is used in connection with the State Milk Control Boards. Most 3445 of our states up here, four of the State Milk Control Boards, are still establishing minimum rate sale prices on milk. Of course, that involves a considerable amount of work, more so than would be the case if they were only working on producer prices.

Q. When you say you have relations with the market administrator's office, what type of relations do you refer to? Under the order I know the handler is required to make certain reports and to do certain things. Do your relations with the market administrator go beyond seeing that those things are done, or discussing any failures or what have you with him concerning that?

Mr. Hanify: Objection.

A. Why, there is a constant intercourse of correspondence and conferences on the receipt and disposition of the milk which we receive from producers. There are questions regarding company actions and company records.

I am serving on the market administrator's industrial advisory committee on Class 2 prices. I give similar service on his industrial advisory committee on Class 1 milk prices. If he has any questions with respect to any of our records or our performance at any of our plants, that comes to me.

Just as an illustration, we have had considerable 3446 question in the last year or so on the types of records which might need to be kept and what constitutes proof of use with respect to Class 2 limitations in country manufacturing plants. We felt that perhaps we would be better off and our operations under the order might go more smoothly if we tried to develop a little bit a newer accounting system for the benefit of plants. We have been in the

process of doing that. That involved quite a bit of correspondence and conversation with him. That is what I mean generally by relationships between our company and his office.

Q. Would that relationship involve numerous practical questions in connection with the conduct of the milk industry from the handler's point of view and the market administrator's point of view? Is that correct?

A. That is correct.

Q. No policy questions?

A. If there were a change in a policy with respect to the order, it would be my job to recommend that change within the company and then to make that change known to the market administrator in the same way as if he were going to change any of his policies with respect to investment, type of statistics, enforcement, if he adjusts anything like that, I would be the one in our company to whom he would come for advice, the one he would notify and so on.

Q. What is the policy of your company with regard to the cooperative payment provisions of the Boston order?

Mr. Hanify: Objection.

A. The policy of our company has been to oppose the inclusion of such a provision in the order. I do not expect we need to go beyond that as far as policy is concerned.

Q. Do you recall in regard to Mr. Merrill's affidavit on behalf of the plaintiffs that approximately 16 pages of that affidavit were devoted to contradicting statements and opinions set forth by Dr. Stitts in his affidavit?

Mr. Hanify: Objection.

A. No, I do not recall that, Mrs. Myers.

Q. Did Dr. Stitts participate in any conferences, or did he do any advising with you and Mr. Merrill in connection with the preparation of Mr. Merrill's affidavit?

Mr. Hanify: Objection.

A. I do not recall any formal conference in which he participated. Dr. Stitts would certainly have known about any

action which was taken in connection with that affidavit after May, 1946.

Q. In his position would he have more responsibility than you in connection with the preparation and filing of such an affidavit?

Mr. Hanify: Objection.

A. Well, it would be hard to distinguish between 3448 that. At that time I had no responsibility whatsoever for the preparation and filing of that affidavit. His responsibility in connection with it would have been very nebulous, to say the least. That affidavit was filed by Mr. Merrill as head of the Government Relations department. It was his sole responsibility. Dr. Stitts would have known about it and may well have participated in a general policy decision as to whether or not his company should continue its policy of being opposed to the inclusion of such a provision in the order. I do not recall any conference or any formal decision on that point during that period.

Q. I was informed—is it true one of your major assignments with Hood & Sons Company has been to endeavor to secure the elimination of the cooperative payment provisions from the order?

Mr. Hanify: Objection.

A. I would not want to admit that as a correct statement of facts. I would go this far, one of the jobs on which I have worked since I have been with Hood & Company has been the preparation of statistical material to be used by our company in connection with public hearings on payments.

Q. In addition to statistical material Hood and the other handlers have submitted briefs in support of the proposals to eliminate the cooperative payment provisions from the order and they have offered testimony of their ex- 3449 perts. Have you assisted in the preparation of those briefs and that testimony?

Mr. Hanify: Objection.

A. Well, to this extent anyway, I have been a member of some conferences in which those matters were discussed. I have been carrying out some assignments of work by Mr. Merrill in connection with the preparation of the testimony and the exhibits.

Q. Well, at the present time now that you have succeeded Mr. Merrill, you would go beyond that, would you not?

Mr. Hanify: Objection.

A. No issue has arisen on cooperative payments since I have succeeded Mr. Merrill.

Q. What did you say the date was?

A. August, 1947. I have not been called upon to recommend or carry out any policy of the company or to be responsible for any policy of the company with respect to cooperative payments. I might add that from the standpoint of time or the number of important issues that have been handled since I have been with the company, cooperative payments is not and would not be classified as one of the major ones. It was one of the issues and one of the hearings we have had on the Federal orders since I have been in Boston.

Q. And even since your employment with Hood & Sons you have not had occasion to examine the hearing records of reports of hearing records, or briefs and testimony submitted by Hood & Sons during the public hearings held prior to August 1, 1941, on the amendment which inserted the cooperative payment provision in the order?

Mr. Hanify: Objection.

A. I may have seen some of the documents submitted by Hood & Sons at earlier hearings. I have no specific recollection of the principal document which was used in the May, 1946 hearing or the findings of the department. As I recall, they were brought into the record by the cooperatives themselves. But other than that I do not recall having seen any of the hearing records or testimony or exhibits presented by Hood in the earlier hearings.

Q. Mr. Welden, you know and I know that as assistant director of the Dairy Branch, you knew everything that was going on and were regarded most of the time even more important in the division than Dr. Stitts. You were there all of the time, isn't that so?

Mr. Hanify: Objection.

(The question was read.)

A. I cannot answer that, yes, I do not know what other people thought of us. I do not know what Dr. Stitts knew about what was going on. Certainly I pride myself
3451 in trying to know specifically what was going on.

Q. You win on that, it was a badly worded question. When Dr. Stitts was away from the office and you were there and generally when Dr. Stitts was not present in Washington, in view of the fact that he was to a great extent engaged in conferences and speaking engagements and outside matters of that kind, members of his staff were required to report to you, to consult with you on questions that required a decision of the Director. You knew the entire routine in connection with the promulgation of the milk marketing orders. You were consulted in connection with plans and in fact in connection with everything of importance to the Dairy Branch?

Mr. Hanify: Objection.

A. To the best of my knowledge, that is true. Certainly I did my best to keep as many time-consuming details away from Dr. Stitts as was possible and to screen as much as possible the material on dairy problems. And particularly fluid milk, that had to go to him for final decision.

Q. You not only kept details from him but you were sufficiently trusted by him and others so that advance matters were left to you?

Mr. Hanify: Objection.

A. I do not recall very many important matters that were decided in the final analysis by me without approval
3452 by him. Most of the matters, important or otherwise, came across my desk during that time.

Q. Dr. Stitts had great confidence in you as we all know, and you worked with him in the Farm Credit Administration before he became director of the Dairy Branch, did you not?

Mr. Hanify: Objection.

A. Yes, I had worked rather closely with Dr. Stitts in Farm Credit. Certainly I had every reason to feel he had confidence in me.

Q. If I were testifying, I could testify to that effect, I know, on oath. Did you see the Ezra Merrill affidavit when it was filed by him?

Mr. Hanify: Objection.

Q. Prior to filing in this case?

A. I do not know, Mrs. Myers, whether I saw the completed document or not. I do not recall having seen him sign it. I do not believe I have ever seen a signed copy of it.

Q. Did you confer with him or Mr. Hanify or other attorneys in connection with that evidence?

Mr. Hanify: Objection.

A. As I recall, I attended one conference with Mr. Merrill on that affidavit at Mr. Hanify's office. I would hesitate to try to remember precisely how much time I put on it. I know that I did confer with Mr. Merrill on it as I 3453 recall trying to get together some statistics on it for him.

Q. Do you remember the discussion in Mr. Hanify's office the time you recall visiting there with Mr. Merrill?

Mr. Hanify: Objection.

A. Well, I recall there having been a conference. I would hesitate to try to repeat verbatim any of it.

Q. What is your best recollection? What was the discussion?

Mr. Hanify: Objection.

A. Why, the general content of it as I recall it, was

simply what it might be possible to try to cover in Mr. Merrill's affidavit. It is hard to be any more specific than that. The general conference was simply about the general subject matter he should try to cover in his affidavit.

Q. What were the points it was decided were particularly important to cover?

Mr. Hanify: Objection.

A. I do not recall, Mrs. Myers, other than just a general concept of Mr. Merrill's views as to the general position and employment of cooperatives in this area. As I recall, there was a considerable tieback to the testimony which Mr. Merrill had given at earlier hearings. It is difficult to be much more specific than that.

Q. Did you know Mr. Hanify at that time?

A. Yes, I knew Mr. Hanify.

3454 Q. When did you first meet him, approximately?

A. I cannot recall, approximately in the spring of 1946.

Q. Was it in connection with this case?

A. No, I guess it was after that. I do not recall whether I first met him in connection with the case or not, Mrs. Myers. I do not believe so. We used another attorney on the hearings in February and March in 1946.

Q. You mean Hood & Sons used another attorney when you say "we"?

A. Yes, thank you.

Q. Had you used Mr. Hanify before? Is Mr. Hanify a counsel for Hood & Company?

A. The firm with which he is associated has been counsel for Hood Company. I do not recall.

Q. That is, Ropes, Gray, Best, Coolidge & Rugg?

A. I am not sure.

Mr. Hanify: That is the correct name of the firm.

Mrs. Myers: I think I learned that after years of trying.

The Witness: As I recall, Mr. Hanify was not out of the Navy at the time I first came into this. I do not believe he was out at the time of that hearing. In any event, we used another attorney in that hearing. As I recall, my

first meeting with Mr. Hanify was subsequent to that hearing.

Q. To the public hearing on the Boston order you mean?

A. Yes.

Q. Do you know how Mr. Merrill happened to make this affidavit, who asked him to make it?

Mr. Hanify: Objection.

3455 A. No, I do not.

Q. Do you know who the plaintiffs in this case are?

A. I beg your pardon.

Q. Do you know who the plaintiffs in this case are?

A. I know generally that they are producers in this milkshed of whom Stark is the first one. I do not know the names of the others.

Q. Did you ever meet any of them?

A. No, not that I know of.

Q. Do you know whether Mr. Merrill ever met any of them?

A. No, I do not.

Q. None of them were present at any conferences between Mr. Hanify, Mr. Merrill and yourself?

Mr. Hanify: Objection.

A. That is right.

Q. You told us a few minutes ago concerning your work in connection with and in relation with the Boston market administrator. What work do you do in connection with relations with the Federal offices in Washington, the Dairy Branch, at the present time in particular?

Mr. Hanify: Objection.

A. The only contact that is of any particular significance at the moment is in connection with the timing of some changes in the order which have been continually tentatively proposed and the change should be coming out in final form one of these days. The other type of relationship is an attempt through them to keep myself
3456 posted on what is going on in other Federal markets

and more importantly at the moment, what is happening to the general dairy situation in terms of production and demand outlook, and the outlook for European purchases, and so on.

Q. Among the matters that you would take up with the Dairy Division would be any problems of Hood & Sons Incorporated as a handler for the elimination of the co-operative payment provisions from the Boston order or for any other change that the handlers might advocate and propose. Is that true?

Mr. Hanify: Objection.

A. Yes, with this exception as a general rule, those proposals are asked for by the market administrator's office when some one else has proposed a hearing.

Q. The market administrator would not include a proposal by handlers to delete certain provisions from an order unless the handlers requested him to do so, would they?

A. No, I simply mean this, frequently at most the administrator acts as a channel through which the proposed amendments are made. I guess officially we have to send those to the Secretary, attention of the Dairy Branch, with a copy to the market administrator. The usual course of events is for some one to send a letter down proposing some change in the order. Following that the market administrator is asked to request all handlers in the 3457 market and cooperatives to make any proposed amendments, and that might be by a certain date so that even in the case of proposed amendments by some one, the channel of communication may well be through the market administrator.

Q. That is right. In addition to that you and any other representative of the handlers are free to go to Washington and discuss any provision you please with representatives of the Dairy Division so long as it is relevant to any particular order. From time to time representatives of the various handlers do, as we both know well, go to Washington for such discussions.

A. That is correct.

Q. If such discussions seem appropriate on the part of your company, are you the one who goes to Washington to discuss those questions?

Mr. Hanify: Objection.

A. Yes.

Q. You never worked for any milk company before you went with Hood & Company?

A. No, I did not.

Q. Prior to the time you were with the Dairy Branch you were with the Farm Credit Administration. Where were you prior to that?

A. I was with Farm Credit Administration from July, 1935, to the date we mentioned in 1942 with, I guess, a year and a half time out during that period to go back to 3458 school for two years. Prior to that I was employed by the National Cooperative Milk Producers Federation which is a trade association of dairy cooperatives and national farm organizations with offices in Washington.

Q. Is that Holman's organization?

A. Yes.

Q. You are familiar with all the cooperatives in his organization?

A. Generally, yes.

Q. You are thoroughly familiar with cooperative practices and history generally as a result of your experience in the Farm Credit Administration, are you not?

A. Generally, yes.

Q. Why does Hood & Company employ you?

Mr. Hanify: Objection.

A. Why? I am afraid you had better reserve that question for Mr. Hood.

Q. Didn't anybody tell you why they wanted you to come to work? Who employed you?

A. Mr. H. P. Hood.

Q. Didn't he tell you why he thought you were desirable? Did you have any discussion about the job?

Mr. Hanify: Objection.

A. Primarily he told me he felt for a long time the Hood Company would benefit from having a well trained dairy economist on their staff. He seemed to feel that I filled the bill and that I would be happy and satisfied with the company, so he offered me a position there. I think that is the primary reason when you boil it down.

3459 Q. Had you met him before?

A. Yes, Mr. Hood was a member of our Milk and Ice Cream Advisory Committee, I believe, during the war and on one other occasion earlier before the war when we were doing a research project in this market, I had occasion to meet Mr. Merrill and Mr. Hood. I had known Mr. Guyer who was with the Hood Company back when he was in the Chicago market.

Q. Then Mr. Hood when he employed you was thoroughly familiar with the background and type of experience and work you had done in the Dairy Branch and the economic experience you had as an economist and student in co-operatives, in fact, your entire background?

Mr. Hanify: Objection.

A. I do not know how much in detail he knew, Mrs. Myers. Certainly he was generally familiar with the work at the Dairy Branch which it had done during the war. I might add on that point that because of the O P A price restrictions and so on, the marketing agreements and orders were not by any means the major job during the war.

Q. I realize that. In the preparation of the Merrill affidavit what consideration was given to the effect upon the cooperative payment provisions in the Boston milk order on the particular plaintiffs in this case?

Mr. Hanify: Objection.

A. I do not know, Mrs. Myers, whether any con-
3460 sideration was given to that or not.

Q. Was there any special consideration given to the problems or desires of the members or non-members of

the cooperatives as a group as distinguished from all other producers in the market?

Mr. Hanify: Objection.

A. I do not know whether there was or not.

Q. To your knowledge and recollection?

A. To my knowledge there was no specific consideration of that while I was present.

Q. You have no recollection of ever hearing how Mr. Merrill happened to get into this affidavit business?

Mr. Hanify: Objection.

A. No, I do not know how many affidavits he has given or when or how.

Q. This particular one is the only one you had any relation with, isn't it?

A. That is right.

Q. In that there was no special consideration given to the problems, the beliefs or desires of the non-members of the cooperatives?

Mr. Hanify: Objection.

A. Well, I am having difficulty getting at what you are driving at. Certainly one of the aspects of cooperative payments in the market is the effect it has on the price received by non-members. I do not recall specifically whether Mr. Merrill's affidavit mentioned that point or not.

3461 Q. What were the major points to be covered by the affidavit you indicated?

Mr. Hanify: Objection.

A. As I recall them, in my memory—I may be mistaken on the affidavit.

Q. Pardon me. Would you like to look at the affidavit?

A. I certainly can answer your questions better.

Q. I have a copy of it. This is an accurate copy, Mr. Hanify.

It is one of the extract copies made at the time the affidavit was filed. (Witness examines paper.)

A. Well, most of the affidavit seems to be devoted to commenting on the material in the affidavits of Mr. Smith and Dr. Stitts and some of the wording in the conclusions of the department with respect to cooperative payments.

Q. You say you do not know the plaintiffs in this case?

A. I beg your pardon?

Q. You do not know the plaintiffs in this case?

A. No, I have never met them personally, no.

Q. Do you know what interest Hood Company had in them?

A. In the plaintiffs?

Q. Yes. And the success of their case.

A. I did not get the last part.

Q. And the success of their case.

Mr. Hanify: Objection.

A. I do not know what interest the Hood Company has in these particular plaintiffs. The Hood Company so far as I know, would like to see the cooperative payment provision removed from the order.

Q. That is a matter of public record in hearings and otherwise?

A. I believe that is right, yes.

Q. Do you know whether Mr. Hanify or the firm he is associated with were retained by Hood & Sons Incorporated to act on behalf of the plaintiffs in this case?

Mr. Hanify: Objection.

A. No, I do not.

Q. What official in Hood Company would know that?

Mr. Hanify: Objection.

A. I do not know, it might be Mr. Merrill or it might be Mr. Guyer, not now with the company, or Mr. Lewis.

Q. Who is Mr. Lewis?

A. Mr. Lewis is one of our executives in charge of legal and financial matters.

Q. What is his name?

A. Harold M. Lewis.

Q. Would Mr. Hood be familiar with details like that?

A. Mr. Hood, I do not know.

Q. Do you know whether any of these plaintiffs were producers selling to Hood & Sons?

A. My information is that one or more of them was a shipper to the plants owned and operated by Hood. I am not too specific on my facts there. I do not know whether they are now or not.

3463 Q. What do you know about these plaintiffs?

Mr. Hanify: Objection.

A. From my own personal knowledge, I do not know anything. My general knowledge has been that these plaintiffs are producers in the Boston pool, Mrs. Myers.

Q. You knew that before you left Washington?

A. Yes.

Q. You know nothing. You have been with Hood & Company working with Mr. Merrill and Mr. Hanify, and you have heard no discussion of these plaintiffs, who they are, what they do, what their instructions are, and what they want?

Mr. Hanify: Objection.

A. Nothing tangible enough that I consider important enough to remember. My general information is that Mr. Stark is a producer who does on order deliver to the Whiting Company. There were others, one or more producers there who do now or did deliver to plants owned and operated by the Hood Company, but I have not met them or have not seen or heard any detailed description of who they are and where they are now, or anything else.

Q. While you were still with the Dairy Branch, did Harry Polikoff discuss this case with you or Dr. Stitts in your presence?

A: I hesitate to answer that yes or no. I knew Mr. Polikoff but I do not recall that he discussed the Stark case with us.

3464 Q. Have you ever discussed the Stark case with any representative of the Whiting Milk Company either while in the Dairy Branch or since you have been with Hood & Sons?

Mr. Hanify: Objection.

A. Why; only in the most general terms. Whiting Company was one of the four petitioning handlers in connection with the public hearings in February and March of 1946. Mr. Bronson and Mr. Cooley were in on some of the discussions in connection with that hearing. I believe Mr. Cooley was in on one of the conferences we held in connection with Mr. Merrill's preparation of his affidavit. Other than that, there is no conference I recall.

Q. Mr. Cooley was the country relations representative for Whiting & Company, as I recall?

A. Yes. I am not sure whether at that time Mr. Bronson did not have the title, and Mr. Cooley was under him. He was certainly in that end of the business.

Q. It is a fact, is it not, that Hood & Sons Incorporated and Whiting Milk Company worked closely together in their efforts to have cooperative payment provisions of the Boston milk order eliminated?

Mr. Hanify: Objection.

A. I only know of one instance in which they did any joint work, and that is in connection with the public hearing in February and March of 1946. At that time four handlers of which Whiting was one and Hood was 3465 one, joined together in their petition and jointly employed counsel to represent them at that hearing.

Q. That is right. I recall the brief that was filed. How did Mr. Cooley happen to be conferring with Mr. Merrill and you concerning this affidavit that Mr. Merrill made for the Stark case, do you recall?

Mr. Hanify: Objection.

A. No, I do not recall how he happened to be there. My guess would be that Mr. Merrill invited him.

Q. You know nothing about the financing of this suit?

A. No, I do not, Mrs. Myers.

Q. Did you yourself assist in the preparation of the brief that was filed after that 1946 hearing in behalf

of the four handlers that was filed by an attorney named Bartlett?

A: Yes, Charles W. Bartlett.

Mr. Hanify: Objection.

A. I was in on some of the conferences at which the contents of that brief were discussed and, if I recall correctly, made some suggestions for changing the rough draft of the manuscript which he had prepared on it.

Q. That brief was a part of the vigorous attempt made at that time by the handlers, particularly Hood and Whiting taking the most active part, to get the cooperative payment provision out of the order, was it not?

3466. Mr. Hanify: Objection.

A. That brief was filed pursuant to a hearing in which a proposal to eliminate the cooperative payments was made by the four handlers, as I recall. Each of the four testified on the subject. If I recall correctly, Mr. Merrill's testimony was a little more lengthy than some of the others. I do not think that you could say that we were any more interested in getting it out than either of the other two companies.

Q. As a matter of fact, you know and I know, that Hood and Whiting had been the most active opponents and have been the most powerful handlers in the area. Of necessity, they have guided the policy.

Mr. Hanify: Is that a question or a statement?

Mrs. Myers: It is not true? Why don't you object generally? On a deposition under the Federal rules you do not have to—

Mr. Hanify: It is to the form of the question.

The Witness: Why, you had Whiting there, to the best of my knowledge, larger than the other two handlers which were joint petitioners in that case. I do not feel you could say at all that we were any more anxious to get them out than the Buttrick Company or White Bros. Both of those companies operate plants in the milk shed and operate as

handlers in this market. They are simply in the same way that Hood and Whiting are.

Q. The provisions of the cooperative payment provisions of Order No. 4 as amended effective August 1, 1941, which are in section 9 of that order, are found by the Secretary of Agriculture to be incidental to and not inconsistent with and necessary to effectuate the other provisions of the order. At that time, was that your opinion? Did you think that finding of the Secretary was well founded?

Mr. Hanify: Objection.

A. I had no basis for having a decision at that time or for passing on it one way or the other.

Q. That is right, you were not in the department until 1942.

A. That is right, and we were not consulted in Farm Credit in any way in connection with the inauguration of that type of provision in the order detailed.

Q. A similar finding appears in the Dayton and Springfield milk order, and Cincinnati milk order, both of which were issued during the time you were with the Dairy Branch. Did you consider the findings in those orders were justified?

Mr. Hanify: Objection.

A. Yes, so long as the Solicitor's office of the Department of Agriculture indicated in their opinion proper payments of that character were legal under the act.

Q. But you had a duty before the Solicitor's office had a duty, did you not, and that was to examine all of the testimony and public hearing records to study that testimony and determine from it from an economic standpoint whether or not the cooperative payments were a factor in the price structure of the milk order and as such were incidental to the other provisions in the order?

Mr. Hanify: Objection.

A. I do not know how you determine precedence on that. Certainly, a finding would have to be consistent with or based on the general knowledge on our part as to what is

legal under the act. But your statement is correct to this extent, that we to the best of my knowledge did make findings to that effect in connection with the orders in Cincinnati and Dayton.

Q. As a matter of practice which is regularly followed by the Dairy Division and was followed at the time you became employed by that division and up to the time of the end of your employment, the regular routine always has been that the Dairy Division must examine the testimony offered and must find a basis for belief that the provision to be put into an order is justified before being sent to the Solicitor's office. Isn't that true?

Mr. Hanify: Objection.

Q. If there were not a factual basis for its belief, the Dairy Division would not send it to the Solicitor's office.

3469 Mr. Hanify: Objection.

A. With this exception, there is a representative of the Solicitor's office generally present at those hearings, and the members of the staff in the Dairy Branch are instructed generally to work quite closely with the civil representatives developing their findings.

Q. It is true, is it not, that neither you nor Dr. Stitts would approve of a provision or an order if you did not believe there was sufficient evidence in the public hearing record to support the provisions of the order?

Mr. Hanify: Objection.

A. Certainly that is true.

3470

Afternoon Session.

Mrs. Myers: What I am going to ask you is repetition, Mr. Welden, but I think maybe you will remember I still have a feeling you know more about the Stark vs Brannan case than indicated so far. I wonder if it will remind you if I say that you said to Mr. Loomis, and this can be verified, if necessary, in April, 1947—Mr. Loomis telephoned me immediately afterwards, and I made shorthand notes of

everything as everybody knows—and Mr. Loomis said at that time you were talking about what you, that is Hood, were trying to decide in connection with the Stark case, whether to go ahead with the case or take some alternative course of action.

Q. Do you recall anything like that?

Mr. Hanify: Objection.

A. No, I might well have talked with Bob Loomis in Washington at that time on the general subject. Of course, I would have known at that time that Mr. Merrill had been working on the affidavit.

Q. This is long after the affidavit was filed. The affidavit was dated November, 1946. This is April, 1947.

A. But I do not recall having made any such statement as that or why I would have a basis for making it.

Q. Mr. Loomis said you came into his office in the 3471 course of talking about a variety of things, including the Stark case, you had made that statement. Mr. Loomis also said, in the same conversation, "Bill spoke of narrowing the issues," referring to you.

A. What?

Q. Narrowing the issues in the Stark case. Does that cause you to remember anything of that conversation?

A. No, I had conversations with Mr. Loomis in Washington after I came up here. I do not recall talking about the Stark case with him. I may well have. There may have been some general information kicking around in the industry on the case, but I do not recall the instance. Certainly I have not taken part in any decision to continue or discontinue the case.

Q. Do you know anybody in your company who has taken part in any such decision?

A. No, I have not.

Q. You have no recollection yourself of discussing the attitude that Hood & Sons were going to take toward this case?

Mr. Hanify: Objection.

A. No, I have no recollection of having discussed it in those terms, no.

Q. What do you think the interest of Hood & Sons in Stark vs. Brannan case is?

Mr. Hanify: Objection.

A. My general impression is that Hood Company would prefer to see the case won by the plaintiffs and of course the payment deleted from the order.

Q. Well, I think we all know from the public hearings that is the attitude of Hood & Company. Probably it would be happy to see any case won that would accomplish that purpose. But is it taking any direct interest in this case in the sense of deciding what the course of the case shall be, retaining counsel, discussing with counsel what action shall be taken in the case and financing the case?

Mr. Hanify: Objection.

A. I do not know what financial interest they have in it, Mrs. Myers. I do know that the company and Mr. Merrill particularly have demonstrated a willingness to help in any way they could in the case. They have been completely willing to file an affidavit or answer any questions from Mr. Hanify when he called up for some help.

Q. Is it your belief that if Hood & Company did not finance this case, it would not continue?

Mr. Hanify: Objection.

A. Mrs. Myers, I do not know how to answer that at all, I do not know what would happen to the case. I do not know the extent to which it is financed, if at all.

Q. Would a determination as to participation of Hood & Sons in this case come within your duties as government relations director?

A. Not specifically. I do not feel a decision to participate in it or to cease to cooperate in it in any way would be made by its being discussed with me, but probably I would not be the one to initiate any such move.

Q. Would that come under the head of a policy matter?

A. Yes, it would.

Q. A matter of public policy as far as the Hood Company is concerned?

A. It might be public policy or a legal question.

Q. If it were legal policy, it would be discussed with the attorneys for Hood & Company, would it not?

A. It would.

Q. And the attorneys for Hood & Company, the regularly retained attorneys for Hood & Company are the firm we mentioned this morning?

A. That is what my understanding is.

Q. Does Mr. Hanify work on Hood & Company legal matters as one of the associates of that firm?

Mrs. Myers: I do not know what your connection is, whether you are a partner or going to be a partner. I do not know what you are, or whether you are just one of the bright young men.

Mr. Hanify: What is the question?

(Discussion off the record.)

Mr. Hanify: I am a partner in the firm.

The Witness: I do not know the answer to your question specifically. Mr. Hanify apparently has been assigned some of our work, but other parts of it have been assigned to other attorneys in that firm.

3474 Mrs. Myers: If the record shows Mr. Hanify is a partner in the firm, that answers the question, anyway.

Cross examination.

By Mr. Hanify:

Q. Mr. Welden, will you summarize your educational experience and background?

A. I was graduated from the Alabama Polytechnic Institute in Auburn, Alabama, in 1930 with a degree of Bachelor of Science in Agriculture. In 1931 and 1932 I took graduate work at the North Carolina State College and received from that institution a degree of Master of Science in agricultural economics.

I attended Harvard University from September, '38 to June, 1939, and again from September to December, 1940, taking further graduate work in economics.

For experience I was employed as a research assistant while at North Carolina State College. I was employed as junior agricultural economist by the Metropolitan Life Insurance Company of New York, from July, 1931, through March, 1932.

I was employed as economist by the National Cooperative Milk Producers Federation in Washington from July, 1933, until July, 1935. I was employed as an agricultural economist with the Farm Credit Administration from July of 1935 until October, 1942. I was assistant chief of the 3475 Dairy Branch of the Department of Agriculture from October, 1942, until October, 1945. Since October, 1945, I have been employed by H. P. Hood & Sons Incorporated of Boston.

Q. In this case there has been an affidavit filed by one Chester W. Smith. Was Mr. Smith employed in the Dairy Division at any time while you were there?

A. Yes, Mr. Smith was employed in the Dairy Branch from the time I became an employee of that branch until somewhere around July and August, 1945.

Q. Is the Mr. Smith we mentioned the gentleman who just entered the room?

A. Yes, he is.

Q. Do you know what his subsequent employment was after leaving the Dairy Branch?

A. My knowledge is not too specific, but my general information is that he established and became director of an economic service in the Boston milk market which service, according to my general knowledge, was financed primarily by the so-called operating cooperatives in this market.

Mrs. Myers: Let the record show I object merely because it is not cross examination.

Q. Do you know by whom he is at present employed?

A. From my knowledge, my general knowledge is, he is still employed in that same capacity as director of the co-operative dairy economic service.

Q. In the operating cooperatives which you have mentioned are cooperatives which have qualified for deductions out of the pool?

A. That is correct.

Q. In your direct testimony, Mr. Welden, reference was made to your knowledge of the various orders issued by the Secretary of Agriculture regulating the handling of milk in other than the Boston market? Can you tell us in general how many metropolitan milk markets in the United States are regulated by Federal orders issued by the Secretary of Agriculture under the agricultural marketing agreement act?

Mrs. Myers: Would you mind stating what you mean by metropolitan milk markets?

Mr. Hanify: I will change the question and strike out metropolitan and insert cities.

Q. Do you know in how many marketing areas in the United States there are Federal milk orders in effect promulgated by the Secretary of Agriculture under the agricultural marketing agreement act of 1937?

A. There are approximately thirty.

Q. Do you know in how many of these orders there are provisions contained for payment to cooperative associations out of the equalization pool?

A. To the best of my knowledge there are four.

Q. Can you tell us what those four orders are or to what areas they are applicable?

A. Yes, those are the orders for greater Boston, for New York city, for Cincinnati, Ohio and for Dayton, Ohio.

3477 Q. So far as you know, are they the only milk orders issued by the Secretary under the act which contain comparable provisions for payment to cooperative associations out of the pool?

A. As far as I know, they are.

Q. Have you from time to time been the author of various pamphlets pertaining to the economics of the dairy industry, Mr. Welden?

A. Well, I was with the Farm Credit Administration, I

was joint author of some five or six publications dealing with milk marketing and cooperative milk marketing associations.

(Pamphlet, Farm Credit Administration, United States Department of Agriculture, Washington, D. C., marked Exhibit 1 for identification.)

Q. Mr. Welden, I show you a pamphlet which has been marked Exhibit 1 for identification, which bears the title, Farm Credit Administration, United States Department of Agriculture, Washington, D. C. Base allotment of quota plans, used by farmer cooperative milk associations by William C. Welden and Louis B. Herman, Cooperative Research and Service Division, May, 1940. Are you the William C. Welden who is the co-author of that publication?

A. I am.

Q. Is this publication an official government publication?

A. Yes.

Mrs. Myers. I will admit that.

3478 The Witness: The Farm Credit Administration,
Department of Agriculture.

Q. Are you familiar with any price plan or system in vogue from time to time in the dairy industry designed to give producers current prices for their milk based on their marketing of milk during some previous representative period of time?

A. Yes.

Mrs. Myers: Are you referring to base rating, Mr. Hanify? The answer is yes?

Q. You heard Mrs. Myers' comment on that base rating?

A. Yes.

Q. Is that the short title or short name for the system which I described in my previous question?

A. Yes, they are variously known as base rating plans, base plans or quota plans.

Q. Would you give us a description of the essential features of the base rating or quota plans?

A. I would be glad to try. The base rating or quota plan is essentially a method for distributing the returns from the sale of milk among producers. The essence of it is that each producer is assigned a base or quota usually determined according to his deliveries in some designated period. The most usual custom was to determine his quota on the basis of his deliveries in two or three fall months and for subsequent months that producer is paid one price for his base quantity of milk and another lower
3479 price for any milk that he delivers over and above his base for his quota.

Q. When did you enter the employ of Hood & Sons, Mr. Welden?

A. October 1, 1945.

Q. Have you been familiar with general economic conditions in this market since that date?

A. Yes, I have.

Q. Were you previously familiar with them?

A. In general terms, yes. Of course, I have been much more familiar since October, 1945.

Q. Do you have any knowledge with respect to the prices charged by qualified cooperative associations for milk sold to your company and other proprietary handlers from 1945 up to date?

Mrs. Myers: Objection.

A. Yes, I have rather specific knowledge as to the prices charged for milk sold to our company and only the most general knowledge based on general familiarity with the market of the price charged to the other buyers.

Q. Confining your answer then to the prices charged for milk sold to your company by qualified cooperative associations, what relationship have those prices had to the minimum prices specified in the order?

Mrs. Myers: Objection.

Q. Adjusted in accordance with the recognized allowances

in the Federal order for butterfat content, location of delivery point and the cost of receiving and handling?

Mrs. Myers: Objection.

A. In many instances, particularly in the fall of 1946, the fall of 1945 and the fall of 1947 the prices paid to qualified cooperatives for the milk that the Hood Company purchased from them paid them in excess of the prices in the orders adjusted to take account of the factors which you mention, the butterfat, the location and the generally recognized cost of handling.

Q. Could you tell us how much in excess of those prices have been from time to time over the order prices as adjusted in accordance with our previously mentioned adjustment?

A. Well, I think in order to answer that I might put it this way, that the minimum order prices are set forth for different freight zones and for different butterfat content, taking the standard freight zones 1 to 10 miles zones, I understand a butterfat of 3.7 is generally recognized in the markets as the sale of that milk would involve the order within administrative assessment of $2\frac{1}{2}$ cents. In addition to that there was a handling charge which is generally recognized in the market as 20 cents.

I might say there is considerable argument on the 20 cents and some feeling that it should be 25 or 30. The 20 cent figure does not appear in the order anywhere. The prices which we have paid to qualified operating cooperatives have been as high as that in the 1 to 10-mile zones on the price plus 90 cents per hundredweight. That would involve a premium, a maximum premium of $67\frac{1}{2}$ cents if you use the 20-cent handling and $2\frac{1}{2}$ cent administration.

Other prices have been as low as 35 cents; and the various prices which we have found prevailing for the milk that we have purchased have varied from 90 cents to 30 cents right now.

Q. By that you mean 90 cents or 30 cents over the minimum base price specified in the order?

A. That is right, the 90 cents or 30 cents would include the 2½ cents administration and the 20 cents or so handling allowance.

Mr. Hanify: I have no further questions.

Mrs. Myers: The economic conditions you have been discussing prevail at the present time in your opinion, is that right?

The Witness: They prevail at the present time.

Mrs. Myers: Are you talking of current economic conditions?

The Witness: I thought his question covered the period October, 1945 to date.

Mrs. Myers: That is all as far as I am concerned. I thank you very much. I am sorry I had to call you for it.

The Witness: That is all right.

Mr. Hanify: Mr. Welden, is H. P. Hood Incorporated 3482 a producer of milk under the Boston order as well as a handler?

The Witness: Yes. H. P. Hood own a farm which is a producer under the order.

Mrs. Myers: That is the same farm that has been referred to in public hearing records in the past, is it not?

The Witness: I am not too sure. I think this farm was referred to in that hearing in March, 1946.

Mrs. Myers: This has nothing to do with the case, but out of curiosity what does Hood as a producer have to do with its milk?

The Witness: The producer sells and delivers it to H. P. Hood & Company and we are required to pay for it.

Mrs. Myers: Under the Boston market milk order?

The Witness: Surely.

Mrs. Myers: It is stipulated and agreed between counsel for the respective parties that the reading and the signing of the deposition by the witness is waived.

3483 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss.

I, Edward J. Grace, a notary public duly commissioned and qualified in and for the Commonwealth of Massachusetts

do hereby certify that, pursuant to agreement, there came before me on the 8th day of December, 1948 at 10:00 A.M. o'clock at Room 1101, Federal Building, Post Office Square, Boston, Massachusetts, the following named person, to-wit, William C. Welden who was by me duly sworn to testify to the truth and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause; that he was thereupon carefully examined upon his oath and his examination reduced to writing under my supervision; that the deposition is a true record of the testimony given by the witness; and that the said witness did not read or subscribe same, the reading and signing being waived by counsel.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

In witness whereof I have hereunto set my hand and affixed my notarial seal this 15th day of December, 1948.

EDWARD J. GRACE. (SEAL.)

3484 Filed Dec. 16, 1948, Harry M. Hull, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action 12,944

DELBERT O. STARK, ET AL., PLAINTIFFS

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE OF THE
UNITED STATES, DEFENDANT

Deposition of H. P. Hood at Boston, Massachusetts, De-
cember 8, 1948.

3485 IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action 12,944

DELBERT O. STARK, ET AL., PLAINTIFFS

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE OF THE
UNITED STATES, DEFENDANT

Room 1101, Federal Building,
Post Office Square,
Boston, Massachusetts,
Wednesday, December 8, 1948.

APPEARANCES:

Edward B. Hanify, Esq., Ropes, Gray, Best, Coolidge &
Rugg, 50 Federal Street, Boston, for the Plaintiffs.

Mrs. Mary Connor Myers, Office of the Solicitor, De-
partment of Agriculture, Washington, D. C., for the De-
fendant.

Deposition of H. P. Hood, a witness of lawful age, taken
on behalf of the defendant in the above entitled cause where-

in Delbert O. Stark et al are the plaintiffs and Charles F. Brannan, Secretary of Agriculture of the United States, is the defendant, pending in the District Court of the United States for the District of Columbia, pursuant to agreement, before Edward J. Grace, a Notary Public in and for the Commonwealth of Massachusetts, at Boston, Massachusetts, on the eighth day of December, 1948.

H. P. Hood, a witness of lawful age, being first duly sworn in the above cause, testified on his oath as follows:

Direct examination.

By Mrs. Myers:

Q. Mr. Hood, you are the president of H. P. Hood & Sons, Incorporated?

A. That is right.

Q. What is the street address?

A. 500 Rutherford avenue, Boston.

Q. And that is a company which is a handler of milk under the provisions of the Boston milk order and other milk orders issued by the Secretary of Agriculture?

A. That is right.

Q. How long have you been president of the company?

A. Since about October, 1936, I think.

Q. Well, Mr. Hood, instead of beating around the bush with a whole lot of questions, I will say frankly what it is I would like you to tell me. You can tell me or not just as you see fit. Remembering, of course, as you know, we are here in connection with the case of Stark vs. Brannan, as it is known now, originally Stark vs. Wickard, we will not make believe neither one of us knew anything about the case before. I have been informed that this is in effect an H. P. Hood & Sons Incorporated case to a great extent, and to a lesser extent the Whiting Milk Company case. I would like to have you tell me what is the interest of Hood & Company in this case.

Mr. Hanify: I object to the question.

Q. Very well. We will begin at the beginning, shall we? To answer that, Mr. Hood, I do not see why we should waste each other's time in this sort of deposition. You answer the question if you see fit. If that is not sufficient, I will ask you some other questions.

Are you appearing as counsel for Mr. Hood or as counsel for the plaintiff?

Mr. Hanify: Counsel for the plaintiffs.

The Witness: As I understand it, you want to know what our interest is in this case?

Q. That is right. You recall the case was filed in September, 1941, or thereabouts?

A. I do not recall when it was filed.

Q. To help your recollection, it was filed according to the record in September, 1941.

A. We are interested in the case as a sizable producer of milk ourselves here in this market. We are interested in the case in that anything that is of interest to our producers and that they ask us to be interested in, we 3488 are interested in. I really do not know just what further to say on that. If it will help save time, too, frankly I have not followed this case and I do not know hardly anything about it. I would be very glad to answer any questions you want to put to me, but I really know practically nothing about it.

Q. As president of Hood & Sons Company, would you be informed if that company was financing a lawsuit in which it was not named as a party?

A. If it was any material financing, I would, I am sure, yes.

Q. Hood & Company has been engaged in a great deal of litigation in the last 20 years, has it not?

A. That depends on what you mean by a great deal.

Q. It has been engaged in substantial litigation?

A. Yes.

Q. So that you would have some idea of what the cost of a case would be when it went to the Supreme Court once, the Courts of Appeal twice, with four different district

judges, with printed briefs and transcripts of record, that would run into a number of thousands of dollars. A matter of that size would be brought to your attention?

A. Yes. Well, anything of any material size, I would know about before any financial expenditure, yes.

Q. Just what degree of supervision do you maintain as president of the company over the Government Relations Division of your Company?

A. Well, I am a member of the same senior board of executives that the head of that department is. My position on that board is what we call coordinator. I have no direct authority over that individual.

Q. Well, how is authority over him exercised, by whom on the part of the company?

A. By a board of executives of which I am the coordinator.

Q. Does this board vote on a proposal that is made by a chief of such a division?

A. That is right.

Q. Whether it approves it or not?

A. The individuals are left quite a lot of discretion. Anything substantial would be brought to the board, and the board would vote on it.

Q. For example, if it were determined by the chief of the Government Relations Division that it were desirable for him to supply an affidavit in a lawsuit and to get away from a hypothetical part of it, in *Stark v. Wickard* as it was originally, would he have authority to decide to do that himself without referring it to the executive—

A. The board of executives.

Q. The board of executives?

A. Yes, to sign such an affidavit.

Q. To make and prepare and sign it?

A. Yes, I would say he would unless he thought there was some principle involved that should be taken in.

Q. In other words, in this case that Mr. Ezra Mer-
3490 -rill who at the time, I understand, was a Government Relations Director for your company, made an affidavit in November, 1946, which was filed on behalf of the

plaintiffs in this case, and, as I understand you, Mr. Merrill would not have been required to take that matter up with the board of executives?

Mr. Hanify: Objection.

A. If I understand, I would not think he would, no, unless he thought there was some principle involved and he thought it was wise to bring it in.

Q. Have you any recollection that Mr. Merrill did take up with the board the matter of whether or not he should prepare and file an affidavit in this case?

A. No, I have no recollection.

Q. Does the board meet regularly?

A. The board does meet regularly.

Q. Are minutes of the meetings maintained?

A. Yes, there are minutes. They are not very detailed minutes, but there are minutes kept.

Q. Are they sufficient to show the topics that were considered at each meeting?

A. No, they would not show anything that was considered unless it was acted upon, unless it was acted upon favorably, that is positively, positive action was taken. They would show a positive matter of policy. If I understand you correctly, something like this would not normally be considered by the board.

3491 Q. Do you yourself vote on that vote?

A. I do.

Q. When there is a tie or all the time?

A. All the time.

Q. Is the Director of Public Policy in the same position as the Director of Government Relations so far as the degree of responsibility he has himself goes?

A. That is right.

Q. And his relations?

A. With the board, that is right.

Q. In 1941, did you have a Director of Public Policy?

A. No, we did not.

Q. How were policy questions for the company handled at that time, by some executive or by the board, or how?

A. Well, it would depend on the nature of the policy. We had some committees of the board, we have a varying number, about twenty-two on the board at the present time. Responsibilities have been changed from time to time. We did not happen to have any position there of head of the public policy at that time. The duties of public policy were spread around among other individuals.

Q. In 1941 and prior to that time, beginning with 1937, have you yourself been actively interested on behalf of your company first in the promulgation of the Boston milk order, and later in connection with the amendments to that order?

A. Not directly, only as a member of our board.

Q. Has the Boston milk order as originally promulgated and as later amended been a matter of concern to your board?

A. Yes.

Q. It is true, is it not, that the policy of Hood & 3492 Sons Incorporated is to oppose or attempt to have deleted from the Boston milk order the cooperative payment provisions of that order that were incorporated in 1941?

Mr. Hanify: Objection.

A. I am not sure of those dates there, I am sorry.

Mrs. Myers: I will say that the record in this case shows, and of course all of the public records show that the cooperative payment provisions were added to the Boston order by the Secretary of Agriculture on July 29, 1941, effective August 1, 1941.

It is also a matter of public record that there were public hearings held on the proposal to incorporate such provisions preliminary to the July, 1941, public hearing. The record also shows that Hood & Company and Whiting Milk Company were the two leading opponents to the petitions of the cooperative payment provisions.

Q. Have you any recollection of that being so?

A. Would you mind telling me which cooperative provisions?

Mrs. Myers: I thought you were familiar with the Boston milk order provisions for payment to cooperatives for certain services rendered, contained in section 9 of Order No. 4. Here it is, 19049, and the next page (Mrs. Myers shows paper to witness).

What I handed to the witness is a copy of the Boston milk order No. 4, Mr. Reporter, as amended, effective August 1, 1941.

A. Your question is what, may I ask?

Mrs. Myers: I think I got rather involved.

(The question was read.)

Mr. Hanify. I object to the question.

The Witness: I do not agree with all that. I think what your question is intended to be, has our company been opposed to deductions from the pool to be paid to cooperatives for their expenses, and so forth. Is that right?

Q. In effect.

A. That is right, our company has been opposed to such deductions.

Q. From the beginning?

A. Well, I do not know when it started, I do not know just what you mean, from the beginning.

Q. It first appeared in the milk order, August, 1941, that order as amended was effective that day. The first chance at publicly opposing them was in the public hearings which preceded the adoption of the order.

A. I am sorry I cannot recall whether it was from the beginning or not. It may have been so.

Q. Was your company opposed to the deductions from the pool to make payments to the cooperatives in 1941?

A. I am sorry, I do not recall.

Q. What is the earliest date you recall your company was opposed to those deductions?

A. Well, by opposed, you mean opposed in spirit and in our thinking, the way we felt about it, or do you mean any—

Q. You can answer it both ways in your thinking and as

you felt about it, but of course I cannot prove anything until you did something.

A. I would think that probably from the time it was first proposed that such deductions be made from the pool and given to certain cooperatives, I would think that our people were opposed to that idea. Just when we did anything about that publicly I have not the slightest recollection.

Q. Well, I can tell you for your information that I know for a fact that at the hearing that preceded the adoption of this order effective August 1, 1941, the records will show that your company did appear as an opponent to the adoption. Anybody can see it who wants to read the record.

A. I would not question that at all but I do not recall it, I do not recall one way or the other.

Q. Is my understanding then from what you say in 1941 the person who would have been responsible for the activities of Hood & Sons Incorporated desired to defeat the adoption of the cooperative payment provisions in this marketing area was Mr. Ezra Merrill?

Mr. Hanify: Objection.

3495 A. I think Mr. Merrill had charge of our relations with the government in 1941. That is my recollection. It would mean any connection we had with the government order.

Q. Do you recall any discussion at a meeting of the board of executives prior to September 21, 1941, concerning the proposal of the case of *Stark v. Wickard*...

A. I am sorry I cannot differentiate that date, 1941.

Q. Has your board of executives discussed this case at any time?

A. I think it was mentioned to the board. I do not think it was in detail. There has not been much mention of it, but I think it has been mentioned there.

Q. Do you recall who mentioned it?

A. I am sorry, no.

Q. I understand from Mr. Welden there is a man named Harold M. Lewis who is the chief of your legal and financial division. Is that right?

A. That is right.

Q. Would Mr. Lewis be responsible for any participation, if there has been any, of Hood & Sons Incorporated in this case?

A. By participation, you mean what kind of participation?

Q. Would he be the one who had conferred with the plaintiffs in the first place, if anybody did confer with them? Who planned to promote the case or conduct and control the strategy of the case or finance the case?

Mr. Hanify: Objection to the form of the question. There are about six questions in one there.

3496 The Witness: Well, if—

Q. All of those things come under the head of legal and financial.

A. Well, it might be discussed with him, any of this.

Q. Who is in charge of matters that result in litigation or have to do with litigation by your company?

A. Mr. Lewis.

Q. Mr. Lewis' office is on Rutherford avenue?

A. That is right.

Q. You know nothing whatever about this case. Is that right?

A. I did not say that.

Q. I have asked you if you do know?

A. I know very little about it.

Q. What do you know about it?

A. Well, I know that the case has to do with a complaint on the part of certain producers that deductions are made from the pool of moneys that would otherwise come to them and are paid over to cooperatives that they are not members of; that they receive less moneys in payments for milk than they would if this situation did not exist; that a suit is in progress in connection with this. I know that we are interested in that suit from the standpoint of being a large producer ourselves being in the same position as these producers. I know that our people have been interested in it from the standpoint of being naturally interested in anything our producers are interested in.

Let me see, I have heard from time to time mention of the

progress of the case. I know so little about it I do
3497 not happen to know just where it does stand at the
present time.

Q. All right, for the record do you know Delbert O. Stark?

A. No, I do not.

Q. Have you ever heard of him? Has his name been mentioned by the board of executives?

A. I do not think I ever have, except as it has been called the Stark case. I have heard it in that connection.

Q. Do you know George Stebbins of Enosburg, Vermont?

A. I do not.

Q. Have you ever heard his name mentioned at a meeting of the board of executives?

A. I do not think so.

Q. Have you ever heard of Francis Walsh of Greenwich, New York?

A. I do not.

Q. Have you ever heard his name mentioned?

A. I do not recall that I have.

Q. Do you know whether he is a producer who ships to Hood & Sons Incorporated or not?

A. I do not know.

Q. Who is Joe Gould? Do you know?

A. No, I do not know Joe Gould.

Q. Who would know the names of the field representatives of Hood & Sons in your company? Who in your company would know the names of the field representatives of Hood & Sons?

A. Well, I think a good many people. One who would know the field representatives best would be Mr. Whiting.

Q. What is his full name?

A. W. O. Whiting.

3498 Q. Is he in your Boston office?

A. He is on our board of executives and operates from the Boston office.

Q. Is he in charge of the field representatives?

A. Yes, not directly perhaps, but overall charge.

Q. Who is directly in charge?

A. Well, it might be a different person for different sections. They would all come under Mr. Whiting. I think that is what you have in mind.

Q. Yes. Do you happen to know who would be in charge of the section which includes Greenwich, New York?

A. Well, I wonder, you said Joe Gould. We have a George Gould out there. I wonder—

Q. It might be George. I understand it to be Joe. It is Gould, anyway. He is a field representative of Hood & Sons?

A. We have. I am not sure whether he would be in that section of East Greenwich. We have a George Gould out in that section. He is a field representative.

Q. Do you know Albert R. Denton of Stowe, Vermont?

A. No, I do not.

Q. Do you know A. F. Stratton of Corinna, Maine?

A. No, I do not.

Q. Did you ever discuss with any representative of the Whiting Milk Company the case of *Stark v. Wickard* and later *Brannan*?

A. No, I did not.

3499 Q. Do you know whether any representatives of that company have discussed the case with your board of executives?

A. Not so far as I know. I do not know of any occasion.

Q. Were reports made to the board of executives concerning the progress of the case?

A. There have been two or three reports over the time, I think yes.

Q. How did they happen to be made to your board of executives?

A. Well, as a matter of interest as other reports are made, things going on here in New England.

Q. Are all cases which involve milk orders discussed by your board of executives?

A. You mean legal cases?

Q. Yes.

A. Yes, they are quite likely to be. I will not say they all have been. They are quite likely to be reported on.

Q. Has Hood & Company contributed anything to the cost of the expenses of this case?

A. I am not sure.

Q. You do not know?

A. I am not sure whether we have or not.

Q. Who are the attorneys for your company?

A. The attorneys for our company are Ropes, Gray, Boyden & Perkins. It is now Ropes, Gray, Coolidge & Pugg. May I change the answer there? You asked if our company had ever contributed anything. I said I was not sure. I think we have. Just what and how I am not sure, but I am pretty sure we have been requested to contribute something and have.

3500 Q. Who would know about that, Mr. Lewis?

A. Well, he might. It would depend on how they happened to, how anything happened to come in. He might.

Q. You seem to have quite a happy-go-lucky way of handling finances.

A. I do not think we do.

Mr. Hanify: Objection.

The Witness: Anything substantial, anything very substantial we have no happy-go-lucky way at all about handling things.

Q. In any company it is my impression, having once been employed as a bookkeeper by Swift & Company, somebody keeps an account of every half cent the company spends and what it is spent for. Isn't that so?

A. I think we have a pretty good system.

Q. Who knows what you spend and why?

A. Who would know this as an individual? I really do not know who, as an individual?

Q. I am not asking you as an individual, I am asking you as an employee of Hood & Sons Incorporated who is responsible for knowing such things and would know the individual?

A. Well, in case Mr. Lewis does not know, do you mean? I would think that either Mr. Lewis or Mr. Merrill would know. I would think so.

Q. What are your personal duties with Hood & Sons Incorporated?

A. Mine?

3501 Q. Yes.

A. Well, as president of the company you mean?

Q. Do you act for them in any other capacity?

A. For the company, except as president.

Q. Yes.

A. In this job I mentioned as coordinator.

Q. Is that a job ordinarily assumed by the president of the company?

A. No, it is a special job that we have in our company that most companies do not have.

Q. As coordinator for the board of executives, do I understand you act as a sort of chairman, as a chairman of the board?

A. No, I am not chairman of the board.

Q. What does the coordinator do?

A. The coordinator, if there is any difference of opinion between individuals, the coordinator is supposed to help reconcile the differences of opinion between two individuals.

Q. Are you pretty good at that?

A. Not very.

Q. As coordinator if there is a difference of opinion between members of the board of executives, you endeavor to reconcile their opinions. If you do not succeed in doing so, what happens?

A. I usually do if we wait long enough. We usually are not in a hurry about reconciling a difference. We usually do before we get through, yes.

Q. Does the board of executives act on things or just discuss them?

A. They act on substantial matters.

Q. How do they act? Is a certain question put to a vote?

3502 A. Well, it is usually a recommendation from an individual member of the board, and the board votes on anything.

Q. It votes on a recommendation to adopt the recommendation?

A. That is right.

Q. You vote, too?

A. That is right.

Q. How do you differ from the other members of the board. Couldn't anyone then act as coordinator if he thought he could reconcile them?

A. Yes, he could. It just happens it is my job.

Q. That is an interesting procedure as you describe it. As president of the company, Mr. Hood, what are your responsibilities?

A. In addition to what I have mentioned?

Q. I want to know what you decide.

A. Well, my job is to set the salaries and the members of the board of executives.

Q. And the board of executives consists of the heads of your divisions?

A. That is right.

Q. Did you set the salary of Mr. Welden?

A. That is right.

Q. What else do you do?

A. It is not really as part of the job of president, but I am chairman of the board of directors.

Q. You are chairman of the board of directors of the company?

A. Yes.

Q. And president of the company, too?

A. Yes.

Q. As president of this company, do you act in that capacity ordinarily commonly associated with being president of a company?

3503 A. No, I think we have a little different form of organization from a good many companies.

Q. Tell us about it. I really am interested in this.

A. Well, the difference is that I do not have as much authority as the ordinary president does in most companies. That authority is exercised by the board of executives. I think that is the principal difference. The board of direc-

tors I mentioned have given authority to the board of executives.

Q. You have delegated to the board of executives. Who hires the executives?

A. The board of executives.

Q. Yes. Who hires the executives who become members of the board?

A. The board do.

Q. The board of executives or the board of directors?

A. The board of executives.

Q. You mean if a chief of a division disappears, he resigns or dies or something, the remaining members of the board of executives select a successor for that man?

A. That is right.

Q. Is there any policy as to the selection of the successors?

A. Well—

Q. Whether it is by promotion from within or employment from without?

A. The policy is to give preference to those within.

Q. Let me see. You fix the salaries. You act as the chairman of the board of directors. What else do you do?

A. I am beginning to think I do not do very much.

3504 Q. You must be the perfect executive. Everything is delegated.

A. That is right, I do not do very much else.

Q. And what things are reported to you as president of the company?

A. I did not mean being a perfect executive.

Q. I have an open mind on that.

A. Pardon me.

(The question was read.)

A. What things are reported to me?

Q. By the various executives of the company?

A. Well, nothing formally except what is reported to the board of executives.

Q. How often does the board of executives meet?

A. Every week.

Q. Once a week?

A. Yes.

Q. How many employees do you have?

A. Why, about 500.

Q. Is there much turnover of personnel?

Q. It depends on what you mean, "much." Compared to the industry as a whole, no, I do not think we have as much as the industry usually has.

Q. You do not have a great many salaries to fix?

A. I only fix salaries of the board of executives. I do not fix any salaries below that.

Q. How often does the board of directors meet?

A. Not very much, as the occasion requires every month or so.

Q. You meet with the board of executives once a week and the board of directors once a month or for special meetings, and you occasionally fix the salary of an executive.

A. Yes.

3505 Q. That is wonderful.

A. I have to take care of depositions and things like that.

Q. You certainly are interesting. You never heard of any of the business of Stark vs. Wickard according to what you have said.

Mr. Hanify: Is that a question?

Q. And you only have heard an occasional report made to the board of executives of which you are the coordinator according to what you have said. Is that all you know? Also you have said, as I understand, Hood & Company may have contributed something to the cost of the case but you would not know how much. Is there anything else you know about this case?

A. I did not say I would not know how much. I said I do not recall. I do not recall a certain contribution.

Q. Could you find out by calling up Mr. Lewis, as president of the company or as coordinator? Wouldn't you have authority to get that information?

A. Well, unfortunately Mr. Lewis is in the hospital undergoing an operation.

Q. Well, that is unfortunate for Mr. Lewis. Is there anybody taking his place in the meantime?

A. Mr. Merrill, I think.

Q. Mr. Ezra Merrill?

A. Yes.

Q. Wouldn't Mr. Merrill confide in you if you asked him to look up and find out what Hood & Sons Company had paid toward this case?

Mr. Hanify: I object.

3506 A. I do not know whether he could or not. What do you want me to do?

Q. I want to know what Hood & Company have paid toward the expenses of this case in court costs, stenographic costs, attorneys' fees, and what it has promised to pay in the future.

A. I do not believe any obligations into the future are there. I think I would know about them if they were.

Q. You do not know about any past ones, do you?

A. I told you I think that we have contributed to the case. How much I do not know.

Q. If we suspend, would you be good enough to call up and find out, or shall I subpoena somebody else from your place?

Mr. Hanify: I will object to any hearsay on the telephone from somebody else.

Mrs. Myers: All right, we will subpoena Mr. Merrill. Will you excuse me a second? We will have about five minutes recess.

(Short recess.)

Mrs. Myers: As far as I am concerned, that is all for the present until we need you in the future when we will call you. It has been most interesting.

Mr. Hanify: I have no questions.

Mrs. Myers: It has been stipulated and agreed between counsel for the respective parties that the reading and
3507 signing of the deposition by the witness is waived.

(This concluded the taking of the depositions.)

3508 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss.

I, Edward J. Grace, a notary public duly commissioned and qualified in and for the Commonwealth of Massachusetts do hereby certify that, pursuant to agreement, there came before me on the 8th day of December, 1948 at 1:00 P. M. o'clock at Room 1101, Federal Building, Post Office Square, Boston, Massachusetts, the following named person, to-wit, H. P. Hood who was by me duly sworn to testify to the truth and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause; that he was thereupon carefully examined upon his oath and his examination reduced to writing under my supervision; that the deposition is a true record of the testimony given by the witness; and that the said witness did not read or subscribe same, the reading and signing being waived by counsel.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

In witness whereof I have hereunto set my hand and affixed my notarial seal this 15th day of December, 1948.

(SEAL.)

EDWARD J. GRACE.

3511 Filed Jan. 31, 1949. Harry M. Hull, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 12944

DELBERT O. STARK et al., Plaintiffs

v.

CHARLES F. BRANNAN, Secretary of Agriculture of the United
States, Defendant

Room 1103 Federal Building
Boston, Massachusetts
December 10th, 1948

Witness: Ezra Merrill, Charlestown, Massachusetts.

Appearances:

Edward B. Hanify, Esq., 50 Federal Street, appearing
for the Plaintiffs.

Mary Connor Myers, Esq., Office of the Solicitor, Depart-
ment of Agriculture, Washington, D. C. appearing for the
Defendant.

3512 Mrs. Myers: I think the record should show that
this deposition is being taken without formal notice
having been served on the attorney for the Plaintiffs and
in accordance with the arrangements made at the suggestion
of Judge Ford and by agreement between counsel.

That is correct, is it not, Mr. Hanify?

Mr. Hanify: That is correct. The arrangement was made
on Wednesday, December 8th at 4:30 P. M.

EZRA MERRILL

By Mrs. Myers:

Q. Your name is Ezra Merrill?

A. That is right.

Q. You are an employee of H. P. Hood & Sons, Inc. of
Boston?

A. Yes.

Q. When did you enter the employ of that company, Mr. Merrill?

A. In the spring of 1934.

Q. What is your position with the company now?

A. I am primarily working on sales research. My title is Director of Sales Research at the present. In addition I act as substitute for certain men in the company when they are away.

Q. And at the present time you are acting as substitute for Mr. H. M. Lewis?

A. That is right.

Q. Who is chief of Legal and Finance Division and who is hospitalized?

A. Yes.

3513 Q. What was your position with the company in 1940 and 1941, Mr. Merrill?

A. At that time I was on Government relations work, so-called, part of the time and part of the time I think I was on special assignment having to do with operating efficiency and conservation of materials and manpower. That was just before the war and we were beginning to be troubled with shortages. As I recall I think I was on the Government relations work under Mr. Geyer until the spring or summer of 1941 and I think I then went to work on this other stuff under Mr. Nourse in the summer of 1941 and stayed in that field for two or three years.

The war came on and I got into war time regulations and that sort of thing.

Q. You are an attorney, as I recall, as well as an economist?

A. No, I am not an attorney. I went to law school but I have never taken the bar exam.

Q. This deposition is being made in the case of Stark v. Brannan which started its career as Stark v. Wickard in 1941 and later Stark v. Anderson, and now the name of the present Secretary is used for the Defendant. When did you first hear of this case, Mr. Merrill?

A. Well, I don't think I could give the exact date.

Q. Approximately, of course?

A. Well, I rather think I heard about it sometime
3514 fairly early, probably in 1941. I think Mr. Geyer represented the company in any discussions that were had concerning the case at the time and I think I picked it up from ordinary conversation around the office.

Q. Mr. Geyer is no longer with the company, is he?

A. No, that is right, he is not.

Q. Do you know where he is now?

A. I think he is in California.

Q. During the public hearing which preceded the amendment of the Boston Order which was issued July 29, 1941, effective August 1, 1941, you appeared as representative of your company, did you not?

A. I appeared at one of those public hearings when the Co-op Payment Amendment was up for discussion and which one it was, whether it was in 1940 or 1941 I cannot recall, but I know that I presented what I thought was a lot of evidence in opposition to the Co-op Payment provision and then prepared a brief afterward.

Q. And those hearings on that subject, according to the record in this case, were held I think some in December 1940 and then they were resumed in the early part of 1941?

A. Well, I am not sure whether I appeared in December or later in 1941 or both. I just wouldn't know. As I say I know I took an active part in the hearings back in the early '40's on this subject.

3515 Q. In 1941, were you a member of the Board of Executives of Hood & Sons, Inc.?

A. No, I wasn't.

Q. When did you become a member of the Board of Executives?

A. I think it was in December of 1942.

Q. And at that time you were Government Relations Director, were you not?

A. Well, no, I don't think so. As I recall I went on the Board working on wartime conservation stuff and wartime regulations and then I think we set up a post-war steering committee, so-called, at that time and I did a lot of work

for the post-war steering committee. I think I was secretary of that committee and Mr. Geyer was then responsible on the Board for Government relations and that responsibility was not transferred to me I believe until a year or so after. I was put on the Board, I think probably it was in the spring of 1944.

Q. Do you recall any of the discussions of this case that were had by Mr. Geyer in your presence in 1941?

Mr. Hanify: Objection.

A. The question is "do you recall". I don't recall any specific discussions, no.

Q. Do you recall generally what was discussed concerning the case?

Mr. Hanify: Objection.

A. Well, I think I recall some of what was discussed concerning the case.

Q. What do you recall?

Mr. Hanify: Objection.

A. Why, as I recall the situation was that the Order had been issued with the Co-op Payment Provision and that had been opposed both by our company and I believe by other dealers and also by non-member producers and I recall hearing that a suit was being started by some non-member producers including a Mr. Stark, attacking the legality of the Co-op Payment Provisions in the Order.

Q. Was Hood interested in promoting that case?

Mr. Hanify: Objection.

Q. At that time.

A. What do you mean by "promoting" the case? We were certainly interested in the case.

Q. Was the company interested to the extent of financing or assisting in the preparation of the case?

A. Yes, the company contributed to the legal costs, I know.

Q. Did the plaintiffs approach the company with the request that the company contribute?

A. I don't know.

Q. Who would know that?

Mr. Hanify: Objection.

A. Well, Mr. Geyer would be the most likely person. Mr. Lewis might know or he might not. I don't know.

Q. Was Mr. Lewis with the company at that time?

3517 A. Oh, yes.

Q. In 1941?

A. Yes.

Q. Was he then Chief of the Legal and Finance Division?

A. Yes.

Q. Do you know any of the Plaintiffs in this case?

A. I don't think I have met any of them. At least I don't recall.

Q. You have heard their names, have you not?

A. I have heard the names of Stark and George Stebbins.

Q. Delbert O. Stark and George Stebbins and Marguerite Denton of Stowe, Vermont—did you ever know them?

A. No, I don't think so.

Q. A man named Stratton of Corina, Maine who is dead now?

A. I don't think I know him.

Q. Francis Walsh?

A. No. I may have met some of these men at hearings just casually at some time or other, but I don't recall meeting them and I don't place them at all except as I have heard their names.

Q. You made an affidavit which was filed in this case on behalf of the Plaintiffs which was signed November 12, 1946, did you not?

A. I think I did, yes.

Q. How did you happen to make that affidavit?

Mr. Hanify: Objection.

A. Well, as I recall Mr. Hanify asked me if I would be willing to give an affidavit in the case on behalf of
3518 the Plaintiffs whom he was representing.

Q. At that time you were a member of the Board of Executives, were you not, in 1946?

A. In 1946, yes.

Q. Did you take that request of Mr. Hanify up with the Board?

Mr. Hanify: Objection.

A. I don't think so, no.

Q. As I understood from the testimony of Mr. Hood, the Division Chiefs have exclusive authority to act individually without submitting matters to the Board. Is that your understanding?

A. Yes, a considerable amount of authority.

Q. As Chief of the Division how do you determine what to submit to the Board and what not to submit to the Board?

A. Well, of course, in regard to expenditures of money, there are disbursements regulations which govern every case then; I mean govern every case of money disbursements.

Q. In that connection is there a regulation which provides that it is necessary to consult with the Board in connection with expenditures of only more than a certain amount?

A. Well, it is more complicated than that. It depends upon the nature of the expenditure what approval is required.

Q. Actually this case raised a point in which Hood & Company was vitally interested, did it not?

A. Oh, yes, yes.

Q. And a case which that company would very much like to see won, would it not?

A. Yes.

Q. And wasn't that case discussed with the Board at all?

A. I don't recall any specific discussions. The Board meets every week and it is very difficult to recall any specific discussion at any meeting. I would imagine that there would have been some comment at the Board meeting at the time of the Supreme Court decision, for example, or something of that sort.

Q. But although Hood & Company prior to that time had rendered assistance in the case, it was not mentioned at the Board meeting?

A. I haven't said it wasn't mentioned. I said—

Q. It was mentioned?

A. I don't know. I don't recall any specific mentioning. Those meetings last the whole morning and a great variety of material is brought up.

Q. Is litigation in which Hood & Company is interested generally discussed?

A. Well, I should say that all depends upon how important it is. Minor litigation will not ordinarily be discussed. I should think major litigation would be.

Q. In your opinion would this case be regarded as minor litigation?

3520 Mr. Hanify: Objection.

Q. In view of the point raised in it?

A. No, I should think it would be regarded as important litigation.

Q. You say that Mr. Hanify requested that you make an affidavit in behalf of the Plaintiffs in this case, and you said that you would, is that true?

A. Yes.

Q. And you did that on your responsibility?

A. I believe I did.

Q. And were you requested to cover certain specific points in that affidavit?

A. I guess so. I can't recall the discussion with Mr. Hanify.

Q. How long did the preparation of that affidavit take, do you recall, approximately?

A. No.

Q. You were assisted in its preparation, were you not, by Mr. Welden?

Mr. Hanify: Objection.

A. Yes, I think to a limited extent.

Q. By anybody else employed by Hood & Company?

A. I don't recall.

Q. Do you recall whether or not you had any conferences with representatives of Whittings during the preparation of that affidavit?

A. I don't remember whether they were in on the conference or not.

Q. Do you recall how you determined what points to cover in that affidavit?

3521 Mr. Hanify: Objection.

A. No.

Q. Do you recall anything about the preparation of that affidavit, the amount of work it took, for instance?

A. Well, I remember being in Mr. Hanify's office one day and having a lengthy discussion on various points that might be covered in the affidavit.

Q. Do you mean "might be covered" or "would be covered?"

A. Well, it was in the preliminary stage. I think it was "might be" at that point. I don't think the affidavit had been crystallized at that point.

Q. Then what was done? You prepared the affidavit yourself?

A. Well, I can't remember who prepared the various parts.

Q. You submitted the affidavit finally to Mr. Hanify for filing, did you not?

A. Yes.

Q. Was that done prior to the time it was signed?

A. You mean was it filed?

Q. Was the draft submitted to Mr. Hanify prior to the time you signed it?

A. Yes.

Q. Were there changes in that draft, do you recall?

Mr. Hanify: Objection.

A. I can't remember. If there were, they were certainly changes which I felt ought to be made. It was my affidavit, if that is the point.

3522 Q. At that time was Mr. Hanify also attorney for Hood & Sons, Inc.?

Mr. Hanify: Objection.

A: Well, his firm acted as counsel for our company in various matters. I don't know whether Mr. Hanify himself was working on anything for the company. I don't know if he was.

Q. Mr. Hanify has worked on legal matters for your company, has he not?

Mr. Hanify: Objection.

A: Oh, yes.

Q. It is true, is it not, that your affidavit was devoted to showing the disadvantages suffered by handlers of milk under the Co-op Payment Provisions of the Boston Milk Order as amended August 1, 1941 rather than to the disadvantages of the producers?

Mr. Hanify: I object to the question. It is not a correct statement of the tenor of the affidavit and the affidavit speaks for itself.

Q. What do you think, Mr. Merrill?

Mr. Hanify: I object to the question.

A. No, I think that affidavit was more extensive than that. I think it covered the producers', non-member producers' interest as well as the dealer interest.

Q. When you were requested to make that affidavit 3523 by Mr. Hanify, were you given a copy of the affidavit which had been made by Chester Smith on behalf of the Defendant?

Mr. Hanify: Objection.

A. I don't know about the timing. I believe I saw a copy of Mr. Smith's affidavit.

Q. Do you recall whether that was prior to the time you made your own affidavit?

A. Oh, yes, it was.

Q. And also prior to the time you were given a copy of the affidavit of Dr. Stitts on behalf of the Defendant?

A: Yes, I believe so.

Q. And were your instructions to answer those affidavits?

Mr. Hanify: Objection.

A. Yes, I think I was asked to review them and state my views on the points that they covered.

Q. Would you state your views on the points covered by them if you agreed with them or only if you disagreed with them?

Mr. Hanify: Objection.

A. Well, I don't think that point arose because I disagreed with them almost entirely.

Q. Were you told what the purpose of your affidavit was?

Mr. Hanify: Objection.

A. Well, I understood that it would be used in connection with a motion by the Government for Summary Judgment in the case. I think that is my recollection that that is what it was, the Government claiming that there was no case here and having filed these affidavits to substantiate its position.

Q. You have, since 1940 at least, been the principal representative of Hood & Sons at public hearings held in connection with amendments to Order 4 of the Boston Milk Order, have you not?

Mr. Hanify: Objection.

A. Most of those hearings, yes; not all of them.

Q. Have you participated in the hearings which involved proposals to delete or qualify the Co-op Payment provisions of the Order?

A. Yes.

Q. You have testified yourself, have you not?

A. Yes.

Q. And you have cross examined other witnesses, have you not?

A. Yes.

Q. And all of your efforts have been directed toward seeking the elimination of those provisions from the Order?

Mr. Hanify: Objection.

A. Yes.

Q. I inquired of Mr. Hood concerning the financial assistance rendered by Hood & Sons in this case and he stated that in the absence of Mr. Lewis you were substituting as Chief of the Legal and Finance Division, and Mr. Lewis' Division is the one that would be informed concerning such assistance, financial or otherwise. Would you please state what assistance has been rendered, financial or otherwise, in the conduct of this case.

Mr. Hanify: Objection.

A. Well, I will tell you what I know about it. There were charges from Mr. Polikoff for legal services and disbursements covering the period 1941, I think it was, through July 1943 and I think the total of those charges was \$5112.55, and I believe that one half of that total, being \$2556.27, was paid by the Hood Company.

There have been charges from Ropes, Gray for the period from 1941 through February 28, 1948 for legal services and disbursements totaling \$17,751.74. Those charges have been rendered the Hood Company and they have been paid in the first instance by the Hood Company, but I believe that the Hood Company has been reimbursed in part on those charges by others. I don't know what part the reimbursement has been.

Q. Do you know who reimbursed them for part?

A. I would believe it would be some of the other dealers who contributed the other half of the Polikoff bills.

Q. Who were they?

A. I believe that was the Whiting Company, White Brothers, Deerfoot Farms and McAdams.

3526 Q. Is Hood and Company committed to pay further expenses in this case?

Mr. Hanify: Objection.

A. I don't know.

Q. Am I correct in understanding that the other handlers named by you contributed the other half of the payment to Mr. Polikoff?

A. I am quite sure on that.

Q. How was the agreement to divide the costs of this case reached, do you know?

Mr. Hanify: Objection.

A. I think Mr. Geyer represented the company in the matter and I don't know.

Q. Do you know who represented the other handlers?

A. No.

Q. Do you know whether the Plaintiffs participated in the making of these arrangements for financing the case?

Mr. Hanify: Objection.

A. No, I don't know.

Q. Are there any records in your office which show any communications with the Plaintiffs, or agreements with them in connection with the financing and conduct of this case?

A. I have never seen any.

Q. You would be likely to see them if they existed, would you not?

A. Why, there would be a good chance of it. I wouldn't necessarily, I guess.

Q. Who would be responsible for such files and 3527 records in the offices of Hood & Sons?

A. Well, that would all depend on who might have had any correspondence with the Plaintiffs, I suppose.

Q. That is right, I would say.

A. It might be Mr. Geyer's secretary or possibly Mr. Lewis' secretary handled it although I should think it would be more likely to be Mr. Geyer's secretary.

Q. Would originals or copies of such correspondence be kept in the custody of the secretary to Mr. Lewis or Mr. Geyer?

Mr. Hanify: Objection.

A. I don't know whether correspondence that old would be kept or not.

Q. How are the files for the company maintained? Do

you have a general file room or do you have files in the office of each Division?

A. Well; it is a little of both. I think there are current files in the office in the area where each department is located and then I think old files up to a certain age are stored in the stable and beyond that they are tossed out, I guess.

Q. Do you have an office manager?

A. Yes.

Q. Is he the one who has custody of the files?

A. Well, to a limited extent. I think the theory is that each department is responsible for its own files and
3528 that the office manager is responsible more in terms of providing space and assuring their security and that sort of thing.

Q. Then under that arrangement correspondence and records in connection with this case would be in the files of Mr. Lewis' Finance and Legal Division, is that right?

Mr. Hanify: Objection.

A. Well; correspondence with other attorneys in regard to the case I guess would be in Mr. Lewis' files.

Q. And correspondence, if any, with the Plaintiffs would be in the file of what Division?

A. I should expect if there were any it would be in the file of what was Mr. Geyer's division.

Q. Who is chief of that division now?

A. Well, it has been split up. I guess that part of it that had to do with Federal orders and so on is now Mr. Welden's responsibility.

Q. You mean the Government Relations Division?

A. Yes, Mr. Geyer originally had the government relations responsibility at one time along with responsibility for operating the Country Department.

Q. Then am I right in thinking such correspondence would be in the files of what was the Government Relations Department, if you call it that?

A. Yes, I guess so. I don't know. I am just talking
3529 in the dark because I have never known of such correspondence.

Q. Who is Secretary of Hood and Company, Inc., the company?

A. Secretary of the corporation? Well, I am not sure. I would have to check.

Q. Do you know who made the arrangements for Mr. Hanify to take over the duties of attorney for the Plaintiffs in this case?

Mr. Hanify: Objection.

A. No, I don't.

Q. If the arrangements were made by your company who would know about that?

Mr. Hanify: Objection.

A. Well, if it were a matter of our company agreeing to Mr. Hanify taking over as counsel I should think Mr. Lewis would know about it.

Q. There would be correspondence or other papers in your files to show such an arrangement, would there not?

Mr. Hanify: Objection.

A. I don't know.

Q. Does the company customarily arrange for retaining an attorney without any written records of any kind?

A. You talk about two different things, Mrs. Myers—about our assenting to Mr. Hanify taking over as attorney for Messrs. Stark and others and about our retaining an attorney for ourselves.

3530 Q. I haven't made myself clear if you think that. I am not referring to any matter of Hood & Company assenting. I am asking about Hood & Son retaining him.

A. I don't think we were the one retained Mr. Hanify for the Plaintiffs in this case.

Q. Did Hood & Son, Inc. as a member of the group of handlers whom you have named retain Mr. Hanify?

Mr. Hanify: Objection.

A. I don't think so although I don't know.

Q. Do you know anything at all about the arrangements

that were made in connection with this case to render assistance by the handlers you named or by Hood & Company individually?

A. I don't think any more than I have already said.

Q. And it is your opinion, is it, that the person who would be qualified to give that information would be Mr. Lewis?

Mr. Hanify: Objection.

A. Well, not necessarily. Mr. Lewis seldom goes out of the office. Mr. Geyer handled the conferences that were held outside the office.

Q. Was Mr. Lewis Mr. Geyer's superior?

A. No.

Q. Mr. Geyer was not required to report to Mr. Lewis?

A. No.

Q. When Mr. Geyer left was there anybody who
3531 was required to know what he had done in the meantime on matters that were pending at the moment?

A. Why, I suppose in a general way—you see, he had already turned over the Government Relations responsibility to me and I had an opportunity to find out anything I thought of that I wanted to find out from him.

Q. Did he turn over his files and records to you in connection with Government Relations matters?

A. He may have. I don't think they amounted to very much.

Q. You mean Hood and Sons, Inc. does not require that files be kept by the Government Relations Department?

Mr. Hanify: Objection.

A. No, it is up to the man in charge of the department what sort of records and files he keeps.

Q. What sort of records and files did you keep as Chief of that Division?

Mr. Hanify: Objection.

A. Oh, I kept anything I thought I might want to refer to again.

Q. Hood and Sons, Inc. is a very interesting company.

Mr. Hanify: Is that a question?

Mrs. Myers: It may end up a question.

Mr. Hanify: I wish you would confine yourself to questions to save time.

Mrs. Myers: I have all day.

3532 Mr. Hanify: You may have but other people have other things to do. I am not going to sit here for a protracted interval hearing your views whether Hood and Company is an interesting corporation or not. If you have a question I will stay here and listen to it.

Mrs. Myers: Would you strike that remark that is irritating Mr. Hanify so?

Mr. Hanify: No, leave it in the record. Let the Court see how this deposition and others have been conducted.

Q. It is true, is it, Mr. Merrill, that the work that was done by the Government Relations Chief and which is being done by you as Chief of the Division you are presently heading and generally in the Division in which you were substituting as a head, that the determination, as to what shall be kept in the way of records covering any actions taken by you was left entirely to your discretion or the discretion of the Division Chief?

A. Yes, I think that is so.

Q. And that it is also true, is it, that as a Division Chief, you were not required to report to the Executive Board matters that you do not consider of sufficient importance to warrant such reporting?

A. Well, that is true provided my judgment in that respect corresponds generally to the prevailing judgment of the Board.

3533 Q. Well, how do you find that out if you don't bring up the subject with the Board?

A. Only if some one makes the point that I have not reported to the Board a subject which ought to have been reported.

Q. Do the other members of the Board have such contact with the work of your Division that they would have reason to inquire concerning your activities?

A. At-present?

Q. At any time since you have been Chief of a Division with Hood and Sons?

Mr. Hanify: I object.

Mrs. Myers: Will you read the question, please?

(The question was read as recorded.)

A. I don't know whether they have reason to inquire. They have opportunity to inquire. Our desks are all together over there and you hear everything and I discuss my work from time to time with the people around there.

Q. Have you discussed your work with Mr. Hood, the president of the company?

Mr. Hanify: Objection.

A. Rather seldom.

Q. What matters do you discuss with the president of the company as a Chief of Division?

Mr. Hanify: Objection.

3534 A. Well, I guess theoretically we report directly to the Board on anything that needs approval or official support, and theoretically Mr. Hood's contact with the individual Board member is that of hiring and firing, salary changes and that sort of thing; so that—beyond that he is also responsible as coordinator which means if something tough comes up that you cannot handle properly in the usual way, why you will go to him for some help in handling the problem. He will not necessarily go into the merits of the problem but he will go into the ways and means of handling it.

Q. You mean if something you describe as "tough" comes up in a division, the Chief of the division would take it to the president of the company?

A. Only after he had exhausted other possibilities of handling it himself; if he felt it was something he felt he could not handle himself in the ordinary way.

Q. And obtain the advice or benefit of the experience of the president of the company, is that right?

A. Not on the merits of the problem but rather how to go about getting it settled. Perhaps he should ask for a special meeting of different individuals or the president might suggest that he check with so and so, getting these men together and putting it up to them.

Q. And thereafter the Chief of the Division could
3535 or would, as he saw fit, take it up with the Board of Executives, is that right?

A. Yes, if it were a matter that called for discussion in the Board.

Q. Who hires the Chiefs of Divisions in Hood and Sons, in any event?

A. The employment relationship between the Board members and the company is handled by Mr. Hood, Mr. H. P. Hood.

Q. That is if there was a vacancy in the position of chief of any division the selection of the successor to the Chief who had gone would be made by Mr. Hood?

A. Well, that is not quite true, either. As a matter of fact, I think the Board votes on appointing anybody to the Board but the actual employment of a man, if he should come on to the Board—put it this way, if a man is going to come into the company directly as a member of the Board I think his employment would probably be handled by Mr. Hood. If he comes in at a lower level, it would not be handled by Mr. Hood. There are probably exceptions to both of those statements but I think that is the way it is usually handled.

Q. Who has the power to discharge a member of the Board?

Mr. Hanify: Objection:

A. I don't know. I don't think that has ever happened.

Q. It is your understanding, is it not, that the primary
3536 interest of Hood and Sons in this case is as a milk handler under the Boston Order?

Mr. Hanify: I object to that.

A. I think we have a dual interest, as a handler and also as a producer.

Q. Which interest is of more importance to the company?

Mr. Hanify: Objection.

A. Oh, I don't know. I suppose our Cherry Hill Farm is one of the biggest farms in the milk shed in terms of its production and we are concerned about subsidized competition which we think is a consequence of the Co-op Payment plan.

Q. Hood and Sons, Inc. is both a producer and a handler? That is right?

A. Yes.

Q. Well, as a producer, as I understand, Hood and Sons, Inc. makes what is called Certified Milk, that is milk of a very high quality?

A. Yes.

Q. And it is true, is it not, that there is a great demand for milk of that quality in the Boston area?

A. I wish it was greater. No, I don't think it is a great demand.

Q. As compared with the supply, is it a great demand?

A. No.

Q. Is the supply in excess of the demand?

A. My impression is it has been frequently, and is frequently, yes.

3537 Q. Hood and Sons, Inc. as a producer, sells its milk to Hood and Sons, Inc. as a handler?

A. No, it doesn't sell. We have only the one corporation that operates the farm and carries on the distributing business. It is only a book transfer.

Q. What proportion of the entire business of Hood and Sons, Inc. is represented by the production end of its business, approximately?

A. I don't know how to measure that.

Q. Well, how about dollars?

A. You mean what is the dollar value of the production of milk at Cherry Hill as compared with the dollar value of what?

Q. Handling milk—strike those questions. You are

right about that. What I want to work out is what is the relative importance in dollars and cents of the production end of the business to the handler end of the business. Is that a question that makes sense to you, Mr. Merrill?

A. Yes, it would be possible to compare the dollar value of certified milk production with the dollar value of the sale of all milk, or something like that. Of course, the certified production dollar value would be a very small fraction of the dollar value sale of all milk.

Q. From the standpoint of investment, how do the two types of business compare?

A. Well, I think the farm would be a bigger proportion in terms of investment.

Q. You mean physical properties?

A. Yes, there is a big investment up there. We have to maintain a lot of people at the plant on the farm to conform to the certified milk production regulations and that is pretty valuable property out there.

Q. It is true and generally acknowledged that Hood and Sons is the largest handler of milk in the New England area?

Mr. Hanify: Objection.

A. Well, I should think we were the largest in terms of the quantity. What I am thinking of is this, you have the General Ice Cream in here in the milk business and you have the Dairymen's League.

Q. Begin with the fluid milk distribution.

A. I should think the Hood Company sold more fluid milk than any other single company—well, fluid milk to the consumer in New England. I think we probably sell more fluid milk to New England dealers and retail consumers. By dealers I mean storekeepers and things like that—than any other company.

Q. Is it true also that Hood and Sons receives more milk from producers than any other handler, proprietary handler in New England?

A. Yes, I think we receive more milk from New England producers than any other proprietary company in

3539 New England. That is, of course, just a general impression. I don't have access to the figures of other companies.

figures of other companies.

Q. Since 1941 it is true, is it not, that the milk production for Hood and Sons, Inc. has been supplied by two farms known as Bonnybrook and Cherry Hill Farms?

A. No, we sold Bonnybrook sometime since 1941.

Q. You sold Bonnybrook sometime around 1945 I think, did you not, approximately?

A. Yes.

Q. So for the past few years your production has been made at Cherry Hill Farm, is that true?

A. Well, let's see, you are talking about the Boston Market?

Q. The Boston Market?

A. We had a farm up in Derry, New Hampshire.

Q. Did that supply milk to the Boston Market area?

A. No, I don't think it did—at least not in recent years.

Q. Both Bonnybrook and Cherry Hill Farm differed very greatly from the average farm, did they not, in that they were in strictly milk producing operations?

A. Well, I think we paid more attention to facilities for visitors than, certainly than the average farmer would.

Q. How large a farm is Cherry Hill?

A. In acres?

Q. Yes.

A. Why—this is only a guess—do you want me
3540 to guess?

Q. Just guess, yes.

A. I think it is around 300 acres.

Q. It is true, is it not, that that farm is used—

A. It may be less than 300. That may be high. I don't know.

Q. It is true, is it not, that that farm is used as a means of advertising the products of Hood and Sons, Inc., the handler?

Mr. Hanify: Objection.

Q. And for promoting good public relations?

Mr. Hanify: Objection.

A. Yes, in part.

Q. And the farm is open to the public, is it not, during the spring and summer months?

A. Yes, at least at certain times.

Q. And it is true, is it not, that facilities are provided for picnics and group outings?

A. Yes, I think so.

Q. And for refreshments and various sports?

A. Well, I don't know how many sports you could accommodate up there. I assume you mean athletic activities?

Q. Hood and Sons, Inc. publishes a company paper entitled "The Milk Maid" does it not?

A. "The Milk Pail."

Q. I show you the September-October 1948 issue of "The Milk Pail", Mr. Merrill. That contains pictures of Cherry Hill Farm, does it not?

A. Yes.

3541 Q. And brief descriptions of its advantages for public entertainment, does it not?

A. Well, will you let me read it through?

Q. Yes, indeed.

A. Well, there is reference here to a recreation field complete with swings, seesaws and a baseball diamond, and there is a picture of a ball game—pictures of people at the farm for an outing and playing games in competition.

Q. The article accompanying those pictures also contains the statement, does it not, that "for three or four months of the year the farm serves another valuable purpose to advertise Hood's milk and dairy products and to build good public relations for the company?"

A. Yes.

Mr. Hanify: Just for the sake of completing the record, what is the sentence just ahead of the sentence you have read.

Q. Yes, read that.

A. "It also has a practical side. Primarily Cherry Hill

is a practical dairy farm, the source of Hood's certified milk and headquarters of the company's breeding program."

Mrs. Myers: That is right. I concede that.

Q. I have some figures here, Mr. Merrill, which obviously you could not agree were absolutely correct without checking with the books and records of your company. 3542 They were prepared yesterday by the Market Administrator's office and prepared so late they could not be typed or certified, but I ask you to look at the first of these which is the statement of receipts by H. P. Hood & Sons, Inc. from its own production covering the years from August 1, 1941 through July 31, 1948, and ask you if they appear to you to be substantially correct?

A. I don't think I could give an opinion, Mrs. Myers, because I am not sufficiently familiar with the quantities of milk produced there.

Q. Well, that seems reasonable, too, as far as that is concerned.

Mr. Hanify, I am going to ask the Market Administrator to prepare a statement covering these figures and request that you agree to their being offered on the record without objection as you have requested me to accede to the offer without objection of figures which the Market Administrator has prepared for you from time to time.

Mr. Hanify: I am always glad to reciprocate with counsel on any reasonable proposition.

Mrs. Myers: The figures will be prepared from the Market Administrator's office.

Mr. Hanify: Are you making reference to the tabulation which Mr. Appen got up at the time of the pre-trial 3543 hearing?

Mrs. Myers: And the figures which he prepared for you then which were sent out and which he prepared at your request.

Mr. Hanify: Yes, I incorporated in the admission of facts

the second document which Mr. Applen prepared and I believe it is in a formal letter he wrote to Mr. Forest.

Mrs. Myers: That is right. I said I would have no objection.

Mr. Hanify: To my admitting that in evidence without producing Mr. Applen.

Mrs. Myers: That is right.

Mr. Hanify: That is agreeable to me if you have the statistics prepared by Mr. Applen with respect to production at Cherry Hill. I will take them on Mr. Applen's certificate without your producing him as a witness, of course saving my objection to the relevancy and pertinency of the material. I don't want to impose any technical obstacles in your path. That is what I am stating.

Q. Assuming that this total which I have shown you for the seven years of 17,986,555 pounds, or we will say roughly 18 million pounds is correct, what loss do you consider

Hood and Sons, Inc. has suffered as a producer of 3544 that production by reason of the Co-op Payment provisions in the Order?

A. Well, during such times in that period as the company has gotten a credit from the Administrator for that production at a blended price less than Class I price, I would assume that the company had suffered a loss equal to the difference between what the blended price actually was and what it would have been had it not been reduced by the amount of cooperative payments.

Q. What proportion of the time do you think that that situation existed?

A. I don't know offhand.

Mrs. Myers: Maybe you would look this way, too, Mr. Merrill.

This is a computation, Mr. Hanify, that I intend to have typed and certified by the Market Administrator. This covers the period from August 1941 down to September 1948. These blanks represent periods when the situation you describe did not exist and this column here represents the receipts from your own farm. This final column headed "Amount" represents loss to the company as the result of

Co-op Payment deductions in the Order showing the months of each year in which the company suffered such a 3545 loss, and showing a total of \$855.56 for seven years.

I show you that because I am going to ask you a few more questions that bear on it—not on the table but on the situation which led to the preparation of the table.

Q. Mr. Merrill, the Cherry Hill Farm is within forty miles of the State House in Boston, is it not?

A. Yes, I believe so.

Q. Therefore that Farm is entitled to the location differential that applies to the nearby zone under the provisions of the Boston Milk Order?

A. Well, I would have to check the Order to answer that question, Mrs. Myers. If a company-owned farm is treated in the same way as a farm operated by a producer who sells to a company and if the location differential was recognized with respect to such nearby producers selling to a company, then the answer will be Yes. Of course, you are aware the Order provisions change from time to time in that respect.

Mrs. Myers: Yes, I have checked those provisions.

That is all. Thank you very much.

Mr. Hanify: Mrs. Myers, so that you won't misunderstand me, the first tabulation which you showed Mr. Merrill was the statistical tabulation from the Market Administrator's books and records of the pounds?

3546 Mrs. Myers: Yes.

Mr. Hanify: And that is the tabulation with respect to which I am willing to take the certificate.

Now the second tabulation as you describe it, as a conclusion with respect to losses, seems to me to go beyond merely statistical data and I don't intend to stipulate as to conclusions derived from statistical data.

Mrs. Myers: I evidently didn't make myself clear.

This tabulation is based on the books and records of the Milk Market Administrator—his official books and records—and when I offer it it will be offered from that source and certified as being derived from that source.

Mr. Hanify: Just one question—as a producer at Cherry

Hill Farm does the Hood Company belong to any cooperative association qualified for payments under this Order?

Mrs. Myers: I meant to ask that.

The Witness: No.

Mr. Hanify: That is all.

Mrs. Myers: And in that connection may I ask this—it is true, is it not, that as a producer Hood and Company has an assured sales outlet through the largest handler of
3547 fluid milk in the Boston Market area, is it not?

Mr. Hanify: Objection.

The Witness: Well, yes, we have the assurance of some Class I outlet. Of course, we are subject to the provisions of the Order in regard to the allocation of sales to a company-owned farm. In other words, we might not always be able to receive credit at the Class I price for that Farm. I don't know what the situation is at the present time but that has been the case at times in the past.

Mrs. Myers: Is any of the Cherry Hill production sold to any handler other than Hood & Sons, Inc.?

The Witness: I don't think so. If it is, it would probably be only a small amount.

Mrs. Myers: That is all.

EZRA MERRILL.

3548 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

I, Margaret Keany Welch, a notary public duly commissioned and qualified in and for the Commonwealth of Massachusetts, do hereby certify that, pursuant to agreement, there came before me on the 10th day of December, 1948 at 10:00 o'clock a. m. at Room 1103 Federal Building, Boston, Massachusetts, the following named person, to wit, Ezra Merrill: the oath not being administered to the witness at that time and place, he thereafter came before me and the deposition having been transcribed and submitted to him, he under oath confirmed and ratified it, and subscribed his name thereto.

I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties to

the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

In Witness Whereof I have hereunto set my hand and affixed my notarial seal this 21st day of January, 1949.

MARGARET KEANY WELCH.

3551 Filed Oct. 6, 1949. Harry M. Hull, Clerk.

STIPULATION WITH REGARD TO THE RECORD ON APPEAL AND PRINTING OF THE JOINT APPENDIX ON THE APPEAL OF THE ABOVE ENTITLED MATTER IN THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Subject to the approval of this Honorable Court, it is hereby stipulated and agreed between the parties hereto, through their respective counsel, that:

1. A certified copy of the transcript of the public hearings held by the Secretary of Agriculture in October, 1940 and May, 1941 on a proposal to amend Order No. 4 as amended regulating the handling of milk in the Greater Boston marketing area was introduced and admitted in evidence at the trial before this Court on February 7, 1949, and is to be considered part of the record on appeal.

2. Defendant filed a motion dated December 13, 1948 to dismiss this action on the ground that it is fraudulent, vexatious and frivolous, that the plaintiffs are not the real parties in interest, and that this action is not a class suit. That motion was voluntarily withdrawn by the defendant on January 14, 1949. Said motion to dismiss and the withdrawal thereof are to be considered part of the record on appeal and said motion to dismiss is to be printed in the Joint Appendix.

3552 3. Shortly prior to the trial of this action before this Court on February 7, 1949, the intervening defendant filed a motion for leave to amend its answer to plaintiffs' amended complaint by adding to its answer allegations similar to those made in defendant's said motion to

dismiss. At the trial before Judge Holtzoff on February 7, 1949, this Honorable Court granted the intervening defendant leave to amend its answer, over the objection of the plaintiffs. Said motion by the intervening defendant to amend its answer and the order granting said motion over the plaintiffs' objection are to be considered part of the record on appeal, and said motion is to be printed in the Joint Appendix.

4. This stipulation is to be printed in the Joint Appendix.

LIPMAN REDMAN, Esq.,
 607 Ring Building,
 Washington 6, D.C.,
Attorney for Plaintiffs (Appellees);
 J. STEPHEN DOYLE, JR.,
 NEIL BROOKS,
 LEWIS A. SIGLER,
Attorneys for Defendant Brannan
(Appellant in No. 10365);
 WILLIAM E. LEAHY,
Attorney for Defendant-Intervenor
(Appellant in No. 10366).

3555 Filed Dec. 13, 1948. Harry M. Hull, Clerk

MOTION TO DISMISS

Defendant, by George Morris Fay, United States Attorney in and for the District of Columbia, moves the Court to dismiss this action on the following grounds:

(1) This action is fraudulent, vexatious and frivolous and constitutes an abuse of the power and process of this Court.

(2) The real parties in interest in this case who are H. P. Hood & Sons, Inc., Whiting Milk Company, White Brothers, Deerfoot Farms and McAdams Milk Company, all handlers of milk in the Greater Boston milk marketing area, have no legal standing to attack the validity of the so-called "cooperative payments provisions" contained in

Section 904.9 of Order No. 4, Order Regulating the Handling of Milk in the Greater Boston, Massachusetts, Milk Marketing Area, as amended, effective August 1, 1941, and in said order as subsequently amended.

(3). This action is not a class suit within the meaning of Rule 23 of the Federal Rules of Civil Procedure.

Inasmuch as the foregoing defects do not appear on the face of the complaint and were disclosed during the taking of the depositions of plaintiffs Delbert O. Stark, George O. Stebbins, A. R. Denton and Francis Walsh, in Burlington, Vermont, on November 25, 1948, and of William C. Welden and Harvey P. Hood, in Boston, Massachusetts, on 3556 December 8, 1948, and of Ezra Merrill, in Boston, Massachusetts, on December 10, 1948, said depositions will be made a part of this motion when received by the Clerk of this Court.

GEORGE MORRIS FAY,
United States Attorney,
Washington, D. C.

J. STEPHEN DOYLE, JR.,
Special Assistant to the Attorney General,
Washington, D. C.;

MARY CONNOR MYERS,
Office of the Solicitor,
Department of Agriculture,
Washington, D. C.

December 13, 1948.

Tuesday, March 28, 1950

Before HONORABLE HENRY W. EDGERTON and BENNETT CHAMP CLARK, Circuit Judges, and HONORABLE KIMBROUGH STONE, Circuit Judge, sitting by designation:

No. 10365

CHARLES F. BRANNAN, SECRETARY, DEPARTMENT OF AGRICULTURE,
APPELLANT

vs.

DELBERT O. STARK, ET AL., APPELLEES

No. 10366

DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC., APPELLANT

vs.

DELBERT O. STARK, ET AL., APPELLEES

On motion of *Mr. Lipman Redman*, *Mr. Edward B. Hanify* of the Bar of the Supreme Court of Massachusetts was permitted to argue for appellees pro hac vice by special leave of court.

Argument commenced by *Mr. Neil Brooks*, attorney for appellant Charles F. Brannan, Secretary, Department of Agriculture, continued by *Messrs. William E. Leahy*, attorney for appellant Dairymen's League Co-operative Association, Inc., *Edward B. Hanify*, attorney for appellees, and *Neil Brooks*, and concluded by *Mr. William E. Leahy*.

United States Court of Appeals for the District of Columbia Circuit. Filed Nov. 9, 1950. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT

No. 10365

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLANT

v.

DELBERT O. STARK, A. F. STRATTON, A. R. DENTON, G. STEBBINS,
F. WALSH, APPELLEES

No. 10366

DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC., APPELLANT

v.

DELBERT O. STARK, A. F. STRATTON, A. R. DENTON, G. STEBBINS,
F. WALSH, APPELLEES

Appeals from the United States District Court for the District
of Columbia

Argued March 28, 1950

Decided November 9, 1950

Mr. Neil Brooks, Special Assistant to the Attorney General, with whom *Mr. J. Stephen Doyle, Jr.*, Special Assistant to the Attorney General, was on the brief, for appellant in No. 10365. *Mr. George Morris Fay*, United States Attorney, also entered an appearance for appellant in No. 10365.

Mr. William E. Leahy, with whom *Mr. William J. Hughes, Jr.*, was on the brief, for appellant in No. 10366.

Mr. Edward B. Hanfy, of the Bar of the Supreme Court of Massachusetts, pro hac vice, by special leave of the Court, with whom *Messrs. Harry Polikoff, Edgar J. Goodrich and Lipman Redman* were on the brief, for appellees.

Messrs. Marion R. Garstang and Harry Scharnikow filed a brief for New England Milk Producers' Association, et al. as amici curiae, urging reversal.

Before EDGERTON, CLARK and KIMBROUGH STONE,* Circuit Judges

STONE, Circuit Judge: This is an action by several milk producers (not members of milk cooperative associations) against the Secretary of Agriculture to enjoin enforcement of parts of his Order No. 4 as amended (7 C. F. R. p. 35, 1949 ed.; 17 U. S. C. p. 258), gov-

* Sitting by designation.

erning milk marketing in the Boston area. These parts of the Order provided for certain payments to milk cooperative associations from the marketing pool established by the Order. The Dairymen's League Co-operative Association, Inc. (a milk cooperative in the New York area) intervened as a defendant because similar provisions were in an Order governing that area (7 C. F. R. p. 90, 1949 ed.).

Defendant and intervenor filed motions for summary judgment which was denied. There were amendments to the petition and to answers of defendant and of intervenor. Evidence was introduced in the hearing, without a jury, on a permanent order.

The trial court made findings of fact, stated conclusions of law, and entered judgment permanently enjoining enforcement of the challenged provisions of the Order (Stark v. Brannan, 82 F. Supp. 614). The Secretary and the intervenor brought these separate appeals. The New England Milk Producers' Association and eleven other milk cooperatives (all of which are cooperative associations marketing milk in the Boston area and qualified to receive these payments under Order No. 4) have filed a brief in this court as *amici curiae* in support of the appeals.

Before the issues as to the validity of these portions of the Order can be reached, it is necessary to dispose of an issue as to the right of plaintiffs to maintain the action. This issue contains two challenges: (1) it is not a proper class suit; and (2) it is champertous.

The claim that this is not properly a class suit is readily determined in so far as necessary here. The petition alleges that the plaintiffs bring the action "*for themselves and for the benefit of all other persons similarly situated*" (italics added). So far as final disposition of this case is concerned, it is of no moment whether this is properly a class action or not. This is true because the individual plaintiffs have personal claims justifying judicial consideration (Stark v. Wickard, 321 U. S. 288, 303, 305). A companion attack, by the intervenor, alleges that, since the commencement of this action, "one or more of the plaintiffs" has ceased to produce milk or has become a member of the cooperative or voted in favor of such payments to cooperatives. If these allegations be true, it does not affect the standing of the other plaintiffs to maintain the suit.

The charge of champerty rests upon charges in an amendment to the answer of the intervenor to the effect that the plaintiffs are mere nominal parties in an action brought "by and for the benefit of certain handlers of milk," who have no legal standing, and who are financing the litigation. That certain proprietary milk handlers might have financial or business interests affected by this action and that they are not in legal position to present such in court is clear from Stark v. Wickard, 321 U. S. 288. Also, this record is plain

that, at least, some of the present plaintiffs are sincerely interested in maintaining their supposed rights as set out in their pleadings. Again, this record leaves little doubt that although the plaintiffs are contributing seemingly as much as they can, the bulk of the expenses of this action is being furnished by these handlers. However, this situation does not constitute champerty (139 A. L. R. 635 n. and see citations in footnotes 88-91). And even if there were—there is no proof of such—a champertous arrangement between plaintiff and these handlers, that would be no defense to plaintiffs' rights in this action (Burnes v. Scott, 117 U. S. 582, 589). The further argument that the court abused its discretion in entertaining the action is not convincing. The pressure is on the stated position of a trivial private interest opposed to public benefit. We cannot recognize that situation as here present. These *in limine* matters determined, we come to the substantial issues in this controversy.

The broad issue is whether the Secretary exceeded his statutory powers by including in the marketing order this provision for payment to cooperatives. The statute is the Agriculture Marketing Agreement Act of 1937 (7 U. S. C. A. § 601). While other provisions of the Act bear upon this issue, the crux of the controversy is in subsections 8c(5) and (7) (7 U. S. C. A. § 608c(5) and (7)).¹

As conclusions of law, the trial court stated that these provisions of the Order were not authorized by Section 8c(5) of the Act; that they were not authorized by Section 8c(7) (D) of the Act; and that they were "not incidental to and consistent with the terms and conditions specified in" Section 8c(5) and (7) of the Act and were "not necessary to effectuate the other provisions of" the Order—all of which qualities being required by the Act.

Appellant contends (1) that statutory authority for these payments to cooperatives is found in Section 8c(7) (D) of the Act; and (2) that the scope of judicial review is limited to whether substantial evidence (in the hearing before the Secretary on which he based the Order) supports this action of the Secretary.

The intervener contends that such authority is found (1) in the specific provision of 8c(7) (D), and (2) in general provisions in the Act relating to the general purpose and intent of Congress, being Sections 1, 2, 8c(18) and 610(b) (1).²

¹ Hereinafter set forth in so far as pertinent.

² These sections and subsections are, in substance, as follows. Section 1 is "Declaration of Conditions," declaring necessity for preventing disruption of exchange of commodities in interstate commerce caused by impairment of purchasing power of farmers. Section 2 declares a general policy of orderly marketing conditions to establish farm product prices equivalent to those of a base period; and of protecting consumers by gradual approach to such

The Amici Curiae find such authority in 8c(7) (D).

Appellees challenge the contentions as to the scope of judicial review (stating that the basic issue is whether the payments under the terms and conditions of the Order are authorized by the Act "regardless of whether the payments are treated as related to the services specified in the Order, or are related to the other and different services now relied on by the Appellant") and that the Act permits these parts of the order.

From these concentrated statements of the positions of the parties and of the Amici Curiae, there appear only two basic issues. The first is the scope of judicial review. The second is whether subsection 8c(7) (D) construed with 8c(5) of the Act authorizes these provisions of the Order.³

Scope of Review

Appellant states this issue as follows. "The scope of judicial review is limited to the inquiry as to whether substantial evidence in the Hearing Record, on which the Secretary's Order is based, supports the Secretary's action. There being no question that substantial evidence supports the Secretary's findings that the Order provisions for payments to co-operatives are incidental and necessary under Section 8c(7) (D) of the Act, and not inconsistent with Section 8c(5), and inasmuch as the appellees failed to place the entire Hearing Record before the court, the appellees' attack upon the provisions of the Order must fail."

Slightly to narrow this issue, the matter of the claimed failure to "place the entire hearing record" before the trial court will have attention. The trial court found: "Slight procedural changes have been made in them [Orders]. On August 1, 1947, the rates of the payments were revised. The Secretary's original finding has never been amplified or amended." This is sustained by the only evidence, which is "there have been a few minor changes in the cooper-

prices and by authorizing no higher prices. Subsection 8c(18) has to do with the factors to be considered in fixing such prices for milk. Subsection 10(b) (1) authorizes the Secretary to establish committees or associations of producers; to permit producers' co-operatives to act as agents for their members and patrons in connection with distribution of their proceeds; and to accord such recognition and encouragement to producer-owned and producer-controlled cooperatives as will harmonize with the policy toward such associations set forth in existing Acts of Congress, and "will tend to promote efficient methods of marketing and distribution."

³ The very excellent briefs filed here present many matters, but all are arguments setting forth reasons why each of these two issues should be determined for or against the Order.

ative payment provisions." While ultimate action by the Secretary is not equivalent to the hearing records upon which the action is based, this record is clear that both the results of and the records of those later hearings were not regarded as important by either party at the trial. We shall so view them on this appeal.

Appellant cites cases⁴ to support his argument that "as to questions of law involving the specific application of a broad statutory term, in a proceeding in which the agency administering the statute must determine it initially, the reviewing Court's function is limited, and the agency's determination, if not prohibited by the statute, is to be accepted if it is supported by substantial evidence." This argument does not solve the exact issue here. The issue is whether the requirement of payment to the cooperatives for the services, which the Secretary deemed rendered by them to this marketing plan, is "prohibited"—beyond the authority delegated to him by the Act. For the purposes of this litigation, it may be conceded that there was substantial evidence that these services were rendered. His determination that the requirement of payment for such services is within his authority under the Act is an application of the Act (as he understood it) to accepted facts. In short, it is an administrative construction of the Act.⁵ While such constructions are entitled to great weight (*Social Security Board v. Nierotko*, 327 U. S. 358, 368), yet an agency may not finally decide the limits of its statutory power. That is a judicial function⁶ (same, p. 369). Also, *Stark v. Wickard*, 321 U. S. 288, 310 (this case on prior hearing in the Supreme Court). This contention is ruled against appellant.

The Merits

In such issue as we have here, the tests are whether the administrative construction has "warrant in the record" and a "reasonable

⁴ The citations are *Cardillo v. Liberty Mutual Insurance Co.*, 330 U. S. 469; *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111; *Dobson v. Commissioner*, 320 U. S. 489; *National Labor Relations Board v. Nevada Copper Corp.*, 316 U. S. 105; *Gray v. Powell*, 314 U. S. 402, 412-413; *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251; *Parker v. Motor Boat Sales, Inc.*, 314 U. S. 244; *Rochester Telephone Corp. v. United States*, 307 U. S. 125; and *Swayne & Hoyt v. United States*, 300 U. S. 297.

⁵ As stated by Mr. Justice Reed in *Social Security Board v. Nierotko*, 327 U. S. 358, 369: "Administrative determinations must have a basis in law and must be within the granted authority. Administration, when it interprets a Statute so as to make it apply to particular circumstances, acts as a delegate to the legislative power."

basis in 'law' " (Unemployment Compensation Comm. of Alaska v. Aragon, 329 U. S. 143, 154).

(a) *The Record*⁶

While the Order (7 C. F. R. pp. 35-36, §904.1, 1949 ed.) sets out various definitions, for our immediate purposes, a broad definition of the participants in the marketing area is as follows: producers (dairyherd owners), handlers (buyers of milk) and cooperatives (the members of which are producers). Handlers may be either "proprietary" (private concerns) or cooperatives. Every cooperative is obligated to receive all milk offered by its members. Cooperatives are either "bargaining cooperatives" or "operating cooperatives." The distinction between the bargaining and the operating cooperative lies in what it does with the milk received. Bargaining cooperatives are sellers of such milk.⁷ Operating cooperatives are not only such sellers but they have plants to process or manufacture milk into products, such as butter, cheese or dry casein.

Milk is classified according to its ultimate use. Class I is such as is disposed of to the consumer as a fluid. Class II is such as passes into some form of processed product. Class I is definitely worth more. Therefore, all producers (including their representative cooperatives) seek to dispose of as much milk as possible as Class I.

The problems of milk marketing arise mainly from the biological⁸ seasonal character of milk production—affected by the inherent characteristics of milk, which are fluid bulk and perishability. Another influencing factor is the occasional variation in consumption demand on particular dealers which can often not be foreseen. The main problem thus posed is to have available, at all times, enough fluid milk to satisfy the demands therefor and to dispose of surplus milk. To secure sufficient production in the short season, there inevitably results an over production for such use in the fruitful season. The reason why operating cooperatives have processing (or manufacturing) plants is to take care of this surplus production (whenever it may happen) from its members which otherwise might be mostly lost.

⁶ In stating the "record," we are not concerned with the substantiality of the evidence but are stating what it is claimed to show pertinent to this issue of the merits.

⁷ Some bargaining cooperatives do not physically receive milk but find customers for milk which is delivered direct by the producer.

⁸ Cows give more milk from April to August (both inclusive), with shadings upward in March and downward in September, than they do in October to February (inclusive).

The reason for the existence of cooperatives is to make as much money for their producer-members as possible. This they do by consolidating the force of individual member producers in an organization which engages in numerous activities aimed to benefit its members. Some of these activities compose the basis of the factual situation here. The cooperatives make no claim that they are entitled to this disputed payment because of the services to their own members alone. Their claim is based on compensation for services which, they assert, benefit the entire market area—market-wide services.

Various witnesses have testified as to different cooperative services which they deemed of market-wide influence. By no means are all of these urged here as supporting these cooperative payment provisions in the Order. However, we will endeavor to set forth these services as completely and concisely as we can in order that the entire situation may be stated so that there may be no conscious omission from "warrant in the record" showing herein.

There are services which may (for convenience) be roughly grouped according to the character of the service, although some services in one group may have an influence in the other group. These groups are activities in connection with (1) legislation, regulations, orders (including amendments) and litigation affecting milk production and disposition; and (2) educational. In the first group are sponsoring, gathering and coordinating information for use in hearings, preparing evidence and bringing witnesses to hearings, analysis of marketing problems relative to this Order (including those arising from the operation of other milk orders in nearby marketing areas) and, broadly, keeping posted on regulatory matters affecting this area and generally. In the second group are activities connected with research, analysis and alertness as to milk market conditions and trends, and the communication of this information to their member producers and at meetings of producers.

Other services are: milk tests and weights for members' milk, selling milk to handlers, supplying milk during short season, supplying milk to a handler in an unforeseen emergency, utilizing surplus milk, working for price raise to producers, and finding market for member production when his outlet is cut off.⁹ Such is the "warrant in the record" of the factual situation.

⁹ In addition, there are several services so exceptional or so purely for member benefit that they cannot throw weight into the balance. They are: buying milk (from members) which is below fluid milk health standards, cutting ice for non-member at cost, and guaranteeing payment to members if handlers fail to pay.

(b) *The Law*

The crucial provisions of law are portions of §608c(5) and (7). The former is that "In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, *and (except as provided in subsection (7)) no others*" (italics added). The pertinent part of subsection (7) is that orders shall contain one or more "of the following terms and conditions: . . . (D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6) [not involved here], and (7) and necessary to effectuate the other provisions of such order." The issue of law is whether the payments for the services of the cooperatives (hereinbefore set out) are "incidental to and not inconsistent with" subsection (5) "and [are] necessary to effectuate the other provisions of" this Order (as required by subsection (7)). Before putting this issue to the test, it is well to understand the place of these provisions in the Act (so that they may be construed in the light of the whole Act); and to understand the general plan of the Order, of which the cooperative payments provisions are a part.

The Act. The basic objects of the Act are to fix minimum prices¹⁰ for the sale of milk by producers to handlers and to set up machinery by which the price may be fixed and the price received be realized by the producer in full, subject only to such differentials and less only such deductions as are provided in the Act.

In arriving at a minimum price, the Act requires consideration of the price and availability of feeds, and "other economic conditions which affect market supply and demand for milk and its products in the marketing area"; and the prices fixed shall reflect "such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest" (§608c(18)).

Also, in administration of the Act, the Secretary is directed to "accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution" (§610(b)(1)).

If the Secretary finds that a marketing order will tend to effectuate the purpose of the Act, he must issue such.

There is a requirement that any order issued by the Secretary shall provide that each handler shall pay to any authority established under such order a pro rata share of the expenses necessarily incurred by such authority for its maintenance and functioning. Such share payable by a cooperative association of producers shall

¹⁰ There is no prohibition of sale at prices above such minima.

be based on the quantity of the commodity distributed, processed, or shipped by it (§610(b)(2)).

We come now to the provisions of the Act directly involved here. Section 608c(5) directs that any order shall contain "one or more of the following terms and conditions, and (except as provided in subsection (7)) no others."

Condition "A" provides for classification of milk according to its uses, fixing of minimum prices for each classified use to be paid by handlers, and times of payment. Further, that such minimum prices shall be uniform as to all handlers "subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of milk, or any such classification thereof, is made to such handlers."

Condition "B" directs (1) payment of "uniform prices" to all producers (including associations thereof) for milk delivered by them to the "same handler"; and (2) payment of "uniform prices" for milk delivered to "all handlers," irrespective of the use thereof made by any individual handler.

In either case, the payments are "subject only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to each order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketing of milk during a representative period of time."

Condition "C" authorizes provision of a method "for making adjustments in payments, as among handlers (including producers who are handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof," in order to accomplish the purposes set forth in (A) and (B).

Condition "D" is plainly irrelevant to the issues here.

Condition "E" provides (1) for furnishing market information to producers, for verification of weights, for sampling, and for testing milk purchased from producers, with "appropriate deductions therefor from payments to producers" other than cooperatives furnishing such services to their members; and (2) for assurance of, and security for, the payment by handlers to all producers for milk purchased.

Condition "F" prohibits any provision preventing cooperatives which make collective sales or marketing of milk or of its products for its members, from blending the net proceeds of all of its sales in all markets and making distribution thereof to its producers in ac-

cordance with the cooperative contract: *provided*, it makes no sale to any handler at prices less than those "fixed pursuant to paragraph (A)."

Section 608c(7)¹¹ provides that "orders shall contain one or more of the following terms and conditions:"

(C) authorizing selection of agencies "and defining their powers and duties, which shall include only the powers:

"(i) To administer such an order, according to its terms and provisions;

"(ii) To make rules and regulations to effectuate the terms and provisions of such order;

"(D) Incidental to and not inconsistent with, the terms and conditions specified in subsections (5), * * *, and (7) and necessary to effectuate the other provisions of such order."

The Order. The pertinent provisions of the Order are summarized by Mr. Justice Reed (*Stark v. Wickard*, 321 U. S. 288, 296-301) as follows:

"By Order No. 4, the Secretary of Agriculture did fix minimum prices for each class of milk and required each handler in the Boston area to pay not less than those minima to producers, 7 C. F. R. 1941 Supp., §904.4, less specified deductions, §§904.7(b), 904.8. In addition, the order exercised the authority granted by the statute to require the use of a weighted average in reaching the uniform price to be paid producers, as described in the preceding paragraph. §§904.7, 904.8.

"Under the Order, the handler does not make final settlement with the producer until the blended price has been set, although he must make a part payment on or before the tenth of each month. §904.8. But within eight days after the end of each calendar month—the so-called 'delivery period,' §904.1(9)—the handler must report his sales and deliveries, classified by use value, §904.5, to a 'market administrator.' §904.1(8). On the basis of these reports, the administrator computes the blended price and announces it on the twelfth day following the end of the delivery period, §904.7(b). On the twenty-fifth day, the handlers are required to pay the balance due of the blended price so fixed to the producers. §904.8(b).

"Were no administrative deductions necessary, the blended price per hundredweight of milk could readily be determined by

¹¹ This subsection is not confined to milk orders but covers "Terms common to all orders" governing agricultural commodities and products included in the Act.

dividing the total value of the milk used in the marketing area at the minimum prices for each classification by the number of hundredweight of raw milk used in the area. However, the Order requires several adjustments for purposes admittedly authorized by statute, so that the determination of the blended price as actually made is drawn from the total use value less a sum which the administrator is directed to retain to meet various incidental adjustments. In practice, each handler discharges his obligation to the producers of whom he bought milk by making two payments: one payment, the blended price, is apportioned from the values at the minimum price for the respective classes less administrative deductions and is made to the producer himself; the other payment is equal to these deductions and is made, in the language of the Order, 'to the producer, through the market administrator,' in order to enable the administrator to cover the differentials and deductions in question. . . . Apparently, this deduction for payments to cooperatives is the only deduction that is an unrecoverable charge against the producers. The other items deducted under §904.7(b) are for a revolving fund or to meet differentials in price because of location, seasonal delivery, *et cetera*."

The portions of the Order covering these payments to cooperatives are subsections 904.10(a) and (b). Subsection 904.10(a) sets forth the method of determining that a cooperative is qualified to receive payments, and the necessary qualifications,¹² all of which

¹² The necessary qualifications are as follows:

"(1) It conforms to the requirements relating to character of organization, voting, dividend payments, and dealing in products of nonmembers, which are set forth in the Capper-Volstead Act and in the state laws under which the association is organized.

"(2) It operates as a responsible producer-controlled marketing association exercising full authority in the sale of the milk of its members.

"(3) It systematically checks the weights and tests of milk which its members deliver to plants not operated by the association.

"(4) It guarantees payment to its members for milk delivered to plants not operated by the association.

"(5) It maintains, either individually or together with other qualified associations, a competent staff for dealing with marketing problems and for providing information to its members.

"(6) It constantly maintains close working relationships with its members.

"(7) It collaborates with similar associations in activities incident to the maintenance and strengthening of collective bargaining

must be present. Subsection 904.10(b) sets forth the rate of payments to qualified cooperatives, which payment is "from the funds provided by handlers' payments to the market administrator pursuant to §904.9"—that is, from the producer settlement fund (or "pool") referred to by Mr. Justice Reed at pp. 301 and 308 of *Stark v. Wickard*. These rates for bargaining cooperatives and for operating cooperatives are set forth in paragraphs (1) and (2) respectively of this subsection.¹³

Having stated the germane parts of the Act and the general plan and pertinent portions of the Order, we pass to the determination of whether—in the setting of all pertinent provisions of the Act and of the Order—the Act permits payments from these producers to cooperatives for the services hereinbefore set forth from the record. This imposes that we approach this problem with an attitude enjoined by the Act. The considerations creating that attitude are as follows.

The Act did not stop with declaring a policy and leaving to the Secretary of Agriculture to devise methods of making that policy effective. Congress had in mind the then recent case of *Schechter Poultry Corp. v. United States*, 295 U. S. 495 which had denied such broad delegation of legislative power to administrative agencies. That decision allowed "flexibility and practicality" in the effectuation of legislative policy by administrative action, but it required that Congress should declare the "standards" to be applied and should "prescribe limits" to the making of subordinate rules by the administrative body (pp. 530, 541).

by producers and the operation of a plan of uniform pricing of milk to handlers.

"(8) It is in compliance with all applicable provisions of this order."

¹³ These paragraphs are as follows:

"(1) Each qualified association shall be entitled to payment at the rate of 1 cent per hundredweight on the milk which its producer members deliver to the plant of a handler other than a qualified association; except on milk delivered by a producer who is also a member of another qualified association, and on milk delivered to a handler who fails to make applicable payments pursuant to § 904.9 (b)(2) and § 904.11 within 10 days after the end of the month in which he is required to do so. If the handler is required by paragraph (e) of this section to make deductions from members of the association at a rate lower than 1 cent per hundredweight, the payment pursuant to this subparagraph shall be at such lower rate.

"(2) Each qualified association shall be entitled to payment at the rate of 2 cents per hundredweight on milk received from producers at a plant operated by that association."

This Marketing Act was carefully drawn to meet these constitutional requirements. It provided that its policies might be worked out through market Orders. It stated, with particularity, what such orders must or might contain and expressly denied all others. The sole general expression of grant of power as to such orders is that authorizing provisions "Incidental to and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order" (Section 608c(7)(D)). The measuring standard words are "incidental," "not inconsistent," and "necessary."

The matter here is payments from the pool. These payments come out of the money receivable from the pool by all producers, including non-members of qualified cooperatives. They go to producers who are members of qualified cooperatives.

The statutory purpose (as to producers) is to secure to producers at least the fixed minimum price less only the costs of administration and qualified by individual producer differentials (such as quality of milk, location, *et cetera*). (§608c(5)(A)).

The administrator of the market has various duties, among which the Act specifies furnishing marketing information to producers, supervising the weighing, testing and sampling of milk, and assuring payment by handlers to producers for milk purchased (§608c(5)(E)). The costs of administration come from the handlers (§610(b)(2)); and, for furnishing these services of marketing information, weighing, sampling, and testing of milk, "appropriate deductions therefor from payments to producers" (other than those for whom such services are rendered by qualified cooperatives) are authorized (§608c(5)(E)).

The prime purpose of the Act is to establish prices for the agricultural commodities (including milk) covered by the Act (§602). Measured by a base period of time (§608c). The particular requirements as to milk prices are set out in subsections 608c(5)(A) and (B) and 608c(18). All of the provisions in the Act, which affect milk, are directed to this prime purpose. Therefore, any charge or arrangement which reduces the price received by the producer—other than those expressed in the Act—must be jealously scrutinized. This attitude is not only enjoined by the broad purposes of the Act, but it is directed expressly by the limitations in subsection 608c(7)(D) which require not only that a provision in an order shall be "incidental" and "not inconsistent" but shall be "necessary" to effectuate the order.

With this attitude and in the light of the pertinent provisions of the Act and of the Order, we examine these charges and the services urged as justification therefor. As to the activities grouped hereinbefore as "legislation, regulations, orders (including amendments) and litigation affecting milk production and disposition," and

grouped as "educational," there is small basis for argument. Primarily, all of these services are for the benefit of the cooperative members—that benefit flowing often from bettering marketing conditions. The very nature of these activities repels the thought that the Congress intended such to be compensated by deductions against some producers. Section 608c(5) (E) defines clearly the kind of market services for which deductions from payments due only to a portion of the producers may be made. Many of the services here, except litigation, are properly covered by the requirement (§608c(5) (E)) that the administrator furnish marketing information to producers, in which case the subsection provides for payment to the administrator therefor by producers not so supplied by qualified cooperatives, leaving members of such cooperatives subject only to the disposition of such associations. As to litigation, the existence of this suit is proof that such assistance by cooperatives may or may not serve the producers as a whole or only the cooperatives in opposition to independent producers. It is argued that it would take a decided increase in the present staff of the administrator to provide these services and that such increase would be expensive. This is no answer. The Act makes it the duty of the administrator to do this. He cannot farm out these duties to one class of producers at the expense of another class, for this would violate the effect of uniformity of price required in subsections 608c(5) (B) (i) and (ii) and be "inconsistent" therewith. Also, insofar as these services are market-wide useful, the cooperatives are not alone in furnishing such. Some handlers maintain staffs of experts and they, as well as independent producers, contribute similar kinds of services to the market in which all are vitally interested. Such handlers and producers receive no allowance therefor.

As to milk tests, weights and samples, charges for such are covered by subsection 608c(5) (E), both as to members and as to non-members of cooperatives.

Two other factors are (1) working for price increases to producers and (2) finding market for a member's production when his normal outlet is cut off. Important as it is to producers to have better prices, it is not reasonable that such activities by themselves can be a basis for this payment. All producers must, naturally, want to realize as much for their milk as possible. Because of their combined, organized, and directed force, it is evident that cooperatives would have greater influence in the market than independent producers. However, that is no reason why payments should be made therefor by the independents to members of the cooperatives. Payment for such services is "not consistent" with nor "necessary" to the effectuation of an Order. The other of these two factors is so almost entirely a member benefit that it should be put aside.

We have considered hereinbefore various services deemed by witnesses as being bases for this payment to cooperatives. One purpose in so doing has been to cover all services (mentioned in this record) as completely as may be; and another purpose is to dispose of such as seemed clearly insufficient in order, by such elimination, to get down to those services which are the main reliance to support these payments. All of the services first hereinbefore set out and which have not yet been disposed of may be put into two classifications. They have been well defined by witness Chester W. Smith as follows:

"It seems to us these services can be grouped into two general groups. There are services in the market with respect to actual selling operations or what is commonly called the making of milk available for Class I use in the market.

"The other main category is on the country end, or what is commonly referred to as the service of offering producers a market for their milk at all times."

In short, they are adequate market supply of fluid milk, particularly in the short production season, and disposition of surplus supply at all times but particularly in the fruitful season.¹⁴ In either aspect, the problem is one of surplus fluid milk—either for supplying the market or of utilization to save loss of milk beyond market demand therefor. There is no doubt that these services are pronounced aids to all participants in the marketing area—producers, handlers and consumers. This is so clear that it serves no purpose to describe the helpful effects in detail. However, the certainty that these services are beneficial does not determine the issue here of payment therefor in the manner set out in the Order. Helpfulness is not the statutory measure. Those tests are "incidental", "not inconsistent" with, and "necessary." "Necessary" is a harsher requirement than merely beneficial.

Whether the power to provide this payment to cooperatives is "incidental" depends, of course, upon the meaning of that word as used here. The definition given in decisions has varied according to the situation and the statute or instrument to be construed (20 Words and Phrases, pp. 418-434). Probably as good a definition as any, in our situation, is "Certainly an incidental power can avail neither to create powers which, expressly or by reasonable implication, are withheld nor to enlarge powers given; but only to carry into effect

¹⁴ An occasional service in connection with supply is the furnishing of milk to a handler in an emergency caused from a temporary abnormal demand by his customers. This may occur in either season.

those which are granted" (First National Bank v. State of Missouri, etc., 263 U. S. 640, 659). By such definition, this payment is not authorized to carry into effect the powers granted the Secretary under the Act but is opposed to the express requirement of uniform prices to producers subject only to the deductions and differentials set out in the Act.

That this payment is "not inconsistent" is determined by what has last been above stated.

That the payment is not "necessary" is clear from the evidence in this record. The evidence is as follows. The purpose of cooperatives in furnishing these services is to benefit their members. It is impractical, if not impossible, to provide these services to the market for the benefit of members without also benefiting other producers in the market. The cooperatives have been providing these services for many years—long before any regulation of milk marketing by the Congress. There has been no material change therein since such regulation. They can so continue without these payments. The basis of the claims for such payments is not "necessity" but the *equity* of the situation. This equity is that the non-members get the benefit of such services and should share the expense thereof, even though the reason for furnishing such services is to benefit members. The statutory requirement of "necessary to effectuate the other provisions of such order" (§608c(7) (D)) is not met.

Each side urges support in certain legislative history. This history has to do with two matters: (1) the enactment of this Act; and (2) a proposed amendment thereof. As to the first, the bases are the Senate Report and statements on the floor by the committee chairman. Appellees contend that these show that the Congress (influenced by the then recent *Schechter v. United States* decision) was carefully and particularly setting out just what an order by the Secretary might include and nothing more. This contention is, generally speaking, true. However, it does not solve our problem but has the effect (as hereinbefore stated) of enjoining upon the Secretary and the Courts a jealous scrutiny of provisions in an order which are not clearly within the power granted to the Secretary in the Act.¹⁵

¹⁵ A further consideration bears upon this legislative history. Congress was thoroughly familiar with the importance of producer cooperatives in the marketing of milk. Reference to them occurs repeatedly in the Act. Congress must have known of the significance, in the marketing of milk, of these long established activities of cooperatives in connection with supply and surplus. When Congress was endeavoring to conform to the *Schechter* case

The second matter is an attempted amendment of the Act in 1940 by Senate Bill 3426. This Bill clearly authorized payments by nonmembers to qualified co-operatives for market-wide services. In 1938, the Secretary included such payments in an order regulating the New York market area. This provision, *inter alia*, was promptly involved in litigation (*United States v. Rock Royal Co-op., Inc.*, 26 F. Supp. 534, 553) resulting in a final decision (307 U. S. 533), June 5, 1939, that handlers could not challenge this provision but that producers could. The Supreme Court expressly refrained from any discussion of the merits as to such payments. In this setting of challenge and of uncertainty as to the power of the Secretary to include such a provision in a milk order, Senate Bill 3426 was introduced. Those lined with appellant contend that this Bill was merely to clarify and place beyond controversy a power already in the Act. Appellees contend it was intended to add a new power not in the Act. It might have been either. The Bill passed the Senate and got no further. Expressions of proponents at committee hearings are not of influence here. The nearest pertinent expression in the committee report (S. Rep. No. 1719, Seventy-sixth Congress, Third Session) is as follows:

"This authority is considered as being involved in the power to fix minimum prices to handlers and the manner of making payments to producers already contained in the act. Hence, the purpose of section 4 is to establish more explicit standards by which the Secretary shall be guided in providing for such compensation. Both types of services are definitely associated with the proper functioning of an order program and the effectuation of the policy of the act."

This statement in the report is not very helpful here either way. While the last sentence, standing alone, would broadly favor appellant, as a legislative construction of the Act; yet it is equally favorable to appellees as a reason for the amendment, appearing as it does in a report supporting the proposed amendment. As to the possible effect (which we do not determine) of failure to pass this amending Bill, compare *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, 352; *Fox v. Standard Oil Company*, 294 U. S. 87, 96; *Carey v. Donohue, Trustee*, 240 U. S. 430, 436-437; *Pennsylvania R. Co. v. International Coal Co.*, 230 U. S.

decision in setting forth the powers of the Secretary, it is little short of remarkable that it would leave, unexpressed in the Act, the grant of this power to compel these new and drastic payments by nonmembers to qualified cooperatives. Compare *First National Bank in St. Louis v. Missouri*, 263 U. S. 640, 657.

184, 198; *United States v. Delaware and Hudson Co.*, 213 U. S. 366, 414; *Keystone Mining Co. v. Gray*, 3 Cir., 120 F. (2d) 1, 10; and *Fleming v. Hawkeye Pearl Button Co.*, 8 Cir., 113 F. (2d) 52, 58. We conclude that this subsequent legislative history is no assistance in construing the Act.

Another argument favoring appellant is that these payments to cooperatives were accompanied by a reduction in allowable handlers' charges; with the result, that the producer was at little if any more expense than before. This argument might be pertinent in connection with the reasonableness of the Order. It has no bearing upon the validity.

Conclusion

The judgment (here appealed) was stayed on condition that the Market Distributor for this area deposit "all sums representing monthly deductions from the equalization pool" made in accordance with "Sections 904.10 (a)-(d) and 904.8 (b) (5) of said Order" in a special bank account to await the final result of this litigation.

With directions to dispose of this fund and otherwise to proceed in accordance with this opinion, the judgment is

Affirmed.

EDGERTON, Circuit Judge, *dissenting*: The order authorizes payments to a cooperative association only when the Secretary has determined that the association meets the following requirements, among others: ". . . (2) It operates as a responsible producer-controlled marketing association exercising full authority in the sale of the milk of its members. . . . (5) It maintains, either individually or together with other qualified associations, a competent staff for dealing with marketing problems . . . (2) It collaborates with similar associations in activities incident to the maintenance and strengthening of collective bargaining by producers and the operation of a plan of uniform pricing of milk to handlers." These services contribute to the stabilizing of what had been a chaotic and depressed industry. They tend to benefit all milk producers. Individuals cannot perform these services for themselves.

The Secretary found that payments to cooperatives that perform these services are incidental to and not inconsistent with the terms and conditions of § 8c(5) of the Act and necessary to effectuate the other provisions of the order. I think he was not unreasonable in so finding and not wrong as a matter of law. "Necessary" does not always mean "indispensable", "essential", or "vital". *Armour & Co. v. Wantock*, 323 U. S. 126, 129. Its meaning varies with the context. A night watchman for a manufacturing company has been held "necessary for production" within

the meaning of the Fair Labor Standards Act, *Walton v. Southern Package Corp.*, 320 U. S. 540, and prohibition of industrial home work has been upheld as "necessary" to an effective minimum-wage order. *Gemsco, Inc. v. Walling*, 324 U. S. 244. "All that is needed to support the [Secretary's] interpretation is that it has 'warrant in the record' and a 'reasonable basis in law.'" *Unemployment Compensation Commission of Alaska v. Aragon*, 329 U. S. 143, 153-154. I think his interpretation meets this requirement; the more clearly because the Act directs him to "accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution." 49 Stat. 767, 7 U. S. C. § 610(b)(1).

United States Court of Appeals for the District of Columbia Circuit. Filed Nov. 9, 1950. Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit

No. 10365, October Term, 1950

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLANT

v.

DELBERT C. STARK, ET AL., APPELLEES

No. 10366, October Term, 1950

DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC., APPELLANT

v.

DELBERT C. STARK, ET AL.

Appeals from the United States District Court for the District of Columbia.

Before: EDGERTON, CLARK and KIMBROUGH STONE, Circuit Judges.

JUDGMENT

These appeals came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and were argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from herein be, and the same is hereby, affirmed, and that this cause be, and it is hereby, remanded to the said District Court with directions to dispose of the fund accumulated under the stay order

of the District Court pending this appeal, and otherwise to proceed in accordance with the opinion of this court.

It is further ordered by this Court that the costs of appellees Stark, et al., be taxed against Dairymen's League Co-operative Association, Inc.

Per Circuit Judge STONE.

Dated November 9, 1950.

Dissenting opinion by Circuit Judge EDGERTON.

United States Court of Appeals for the District of Columbia Circuit. Filed Jan. 18, 1951. Joseph W. Stewart, Clerk.

In the United States Court of Appeals for the District of Columbia Circuit

No. 10,365

CHARLES F. BRANNAN, SECRETARY DEPARTMENT OF AGRICULTURE,
APPELLANT

v.

DELBERT O. STARK, A. F. STRATTON, A. R. DENTON, G. STEBBINS,
F. WALSH, APPELLEES

No. 10,366

DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC., APPELLANT

v.

DELBERT O. STARK, A. F. STRATTON, A. R. DENTON, G. STEBBINS,
F. WALSH, APPELLEES

DESIGNATION OF RECORD

The Clerk will please prepare a certified transcript of record for use on petition for writ of certiorari to the Supreme Court of the United States in the above-entitled cause (No. 10,365), and include therein the following:

1. Joint Appendix.
2. Minute entry of argument.
3. Opinion.
4. Judgment.
5. This designation.
6. Clerk's certificate.

PHILIP B. PERLMAN,
Solicitor General.

Counsel for Appellant (No. 10,365)

January 17, 1951

CERTIFICATE OF SERVICE

It is hereby certified that copies of the foregoing designation of record have been mailed to the following counsel for appellees:

Edward B. Hanify, c/o Ropes, Gray, Best, Coolidge & Rugg, 50 Federal Street, Boston 10, Massachusetts.

Edgar J. Goodrich, Lipman Redman, Ring Building, 1200 Eighteenth Street, N. W., Washington 6, D. C.

William E. Leahy, William J. Hughes, Jr., 1000 Bowen Building, 821 15th St., N. W., Washington, D. C.

PHILIP B. PERLMAN,
Solicitor General.

January 17, 1951

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages numbered from 1 to 487, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties and the proceedings of the said Court of Appeals as designated by counsel for appellant in case No. 10,365 in the cases of:

No. 10,365

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLANT

v.

DELBERT O. STARK, ET AL., APPELLEES

No. 10,366

DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC., APPELLANT

v.

DELBERT O. STARK, ET AL., APPELLEES

..... January Term, 1951, as the same remain upon the files and records of said Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this second day of February, A.D. 1951.

(SEAL)

JOSEPH W. STEWART,
Clerk of the United States Court of Appeals
for the District of Columbia Circuit.

Supreme Court of the United States

No. 536, October Term, 1950

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE OF THE UNITED
STATES, PETITIONER

VS.

DELBERT O. STARK ET AL.

Order allowing certiorari

Filed April 16, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 537, October Term, 1950

DAIRYMEN'S LEAGUE COOPERATIVE ASSOCIATION, INC., PETITIONER
VS.

DELBERT O. STARK ET AL.

Order allowing certiorari

Filed April 16, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

